

DOCKET

8
No. 83-6663-CSY
Status: GRANTED

Title: Charles Fugate, Petitioner
v.
New Mexico

Docketed:
April 30, 1984

Court: Supreme Court of New Mexico

Counsel for petitioner: Sullivan, J. Thomas

Counsel for respondent: Tupler, Anthony

Entry	Date	Note	Proceedings and Orders
1	Apr 30 1984	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	May 25 1984		Waiver of right of respondent New Mexico to respond filed.
4	May 1 1984	N	Motion of petitioner to consolidate this case with No. 83-6361, Manzanares v. New Mexico filed.
5	May 30 1983		DISTRIBUTED. June 14, 1984
6	Jun 12 1984	F	Response requested.
7	Jul 13 1984		Brief of respondent New Mexico in opposition filed.
8	Jul 19 1984		REDISTRIBUTED. September 24, 1984
10	Oct 1 1984		Petition GRANTED. *****
11	Nov 5 1984		Joint appendix filed.
12	Nov 15 1984		Brief of petitioner Charles Fugate filed.
13	Dec 6 1984		Record filed.
14	Dec 15 1984		Brief of respondent New Mexico filed.
15	Jan 4 1985		SET FOR ARGUMENT. Tuesday, February 19, 1985. (2nd case). CIRCULATED.
16	Jan 10 1985		
17	Feb 4 1985	X	Reply brief of petitioner Charles Fugate filed.
18	Feb 12 1985	X	Supplemental brief of respondent New Mexico filed.
19	Feb 19 1985		ARGUED.

**PETITION
FOR WRIT OF
CERTIORARI**

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

CHARLES FUGATE,

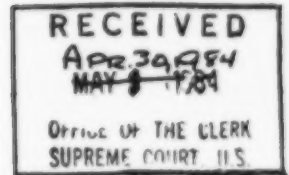
Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

(5)
No 83 - 6663



PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW MEXICO

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QUESTION PRESENTED FOR REVIEW

I.

Whether double jeopardy principles prohibit continued prosecution for vehicular homicide in a state court of general jurisdiction after petitioner has pled guilty to the lesser included offenses of driving while intoxicated and careless driving in a state court of limited jurisdiction which had jurisdiction to try petitioner on the lesser offenses but not on the greater offense and all crimes arose out of the same incident?

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES FUGATE,

Petitioner,

vs.

No.

STATE OF NEW MEXICO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW MEXICO

Charles Fugate respectfully petitions this Court to review a judgment of the Supreme Court of New Mexico. The judgment reversed the opinion of the Court of Appeals which had reversed, on double jeopardy principles, the ruling of the trial court that petitioner could be tried on the offense of vehicular homicide after petitioner had pled nolo contendere to the lesser included offenses of driving while intoxicated and careless driving. (Appendix 1, 2) (Hereinafter referred to as "A-1", "A-2")

CITATION TO OPINION

The opinion of the New Mexico Supreme Court is not yet published and the slip opinion (No. 15,127) is attached to this petition as Appendix "A-1".

JURISDICTION

The judgment sought to be reviewed was filed March 1, 1984. Rehearing was not requested. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3)

STATUTORY PROVISIONS AND CONSTITUTIONAL PROVISIONS

The constitutional provisions relied on by petitioner are the Fifth and Fourteenth Amendments to the United States Constitution.

The Fifth Amendment provides in pertinent part:

. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

The Fourteenth Amendment provides in pertinent part:

. . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

I. STATEMENT OF THE CASE

The following facts are taken from the New Mexico Supreme Court opinion in this case, No. 15,127 filed March 1, 1984, (Appendix "A-1") and from the opinion of the New Mexico Court of Appeals, No. 7113, filed September 1, 1983. (Appendix "A-2")

Petitioner was involved in a three-vehicle accident on August 12, 1981. (A-2, p. 1) Defendant pled nolo contendere in the municipal court¹ of Carlsbad, New Mexico, to the charges of driving while intoxicated and to careless driving. (A-2, p. 1) On September 5, 1981, one of the persons injured in the accident died and on September 11, 1981, defendant was charged by criminal information in district court² with vehicular homicide, the charge being made alternatively in the language of the statute, N.M.S.A. 1978 §66-8-101 (Cum.Supp. 1982),³ and of N.M.S.A. 1978, Uniform Jury Instruction (Crim.) 2.60 (1982 Repl.Pamp.),⁴ to assert death or great bodily injury resulting from

¹The Municipal Court is a court of limited jurisdiction. Sections 35-14-1 and 35-14-2, N.M.S.A. (1978) (Appendix A-3)

²The District Court is of original and general jurisdiction. N.M. Const. Art. VI, §13 Appendix "A-6"

³Copy of statute attached hereto as Appendix "A-4".

⁴Copy of Uniform Jury Instruction (Crim.) attached hereto as "A-5".

petitioner's unlawful operation of a motor vehicle. (A-2, p. 1) On February 1st, Petitioner filed a motion to dismiss on grounds of double jeopardy. Id. The jury was selected on February 2nd and returned a guilty verdict on February 3d. Id. Although the record does not reflect a ruling on Petitioner's motion, it is apparent from the course of proceedings that the motion to dismiss was denied. Id. at p. 1.

II. THE APPEAL

On appeal, the petitioner contended that double jeopardy principles prohibit the state from trying him for vehicular homicide when he had already been tried and convicted on all the lesser included offenses which arose out of the same transaction which led to the criminal information. (A-2, pp. 1-2). In relying on petitioner's docketing statement (which, if not challenged, are taken as true) the New Mexico Court of Appeals inferred that the municipal and state offenses of careless and reckless driving were the same for double jeopardy purposes. (A-2, pp 1-2) The New Mexico Attorney General accepted that inference and asserted only that the exceptions of Diaz v. United States, 223 U.S. 442 (1912), i.e., jurisdictional and lack of necessary facts removed this case from a double jeopardy consideration. (A-2, p. 2)

In its opinion, issued September 1, 1983, the state Court of Appeals held that the "jurisdictional exception" relied on by the state has been unmistakably rejected by the United States Supreme Court. (A-2, p. 2)

The Court of Appeals then addressed the Diaz "necessary facts" exception relied on by the state.⁵ In response to the state's argument, the Court of Appeals stated at page 2 of its opinion:

There is irrefutable logic in the State's position insofar as the death did not occur until after the municipal court

⁵The state contended that although petitioner could have been charged with great bodily injury under Section 66-8-101, N.M.S.A. 1978 (A-4) at the time he was charged with careless driving and DWI in municipal court, he could not have been charged at that time for causing death by vehicle under the same statute because the death had not yet occurred. (A-2, p. 2)

convictions. But it does not alter the more significant fact that a single statute, §66-8-101, condemns both death-by-vehicle and great-bodily-injury-by-vehicle, and imposes the same penalty for either violation. It is equally undisputed that either offense under §66-8-101 can only be committed by reckless driving or by DWI. Defendant was once convicted in municipal court of DWI arising out of the identical incident upon which defendant was later charged in district court; he cannot be tried of a charge requiring proof of the identical conduct upon which he already has been convicted. (citation omitted)

The Court of Appeals concluded that, with this fact pattern, "... the Diaz exception is not a factor in this case. Death-by-vehicle is not a "more serious charge" than great-bodily-injury-by-vehicle." (A-2 at p. 3) The court concluded that, under the circumstances, the state had nothing to lose by filing "great-bodily-injury" charges in district court at the time of the accident upon the facts then known to the state. "under those circumstances, no reliance on the 'necessary facts' exception of Diaz, upon which rests excuse from filing the death-by-vehicle charges at the time, would have been required." Id. at p. 3

The State filed its petition for a writ of certiorari to the Court of Appeals and the New Mexico Supreme Court granted the writ. The state Supreme Court then reversed the state Court of Appeals. (A-1) However, the state Supreme Court accepted the Court of Appeals holding on the issue of the Diaz "necessary facts" issue. The court ruled that the Court of Appeals' ruling on the "necessary facts" exception found in Diaz is "proper and correct." (Appendix "A-1" p. 2) (A-1) Instead, it relied on the Diaz "jurisdictional exception" rule previously held to be the New Mexico rule in State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950) and State v. James, 93 N.M. 605, 603 P.2d 715 (1979)⁶ As in its decision in the Manzanares case, the state Supreme Court refused to reverse its prior rulings that the "jurisdictional exception" is still

⁶This is the same basis for its ruling on State v. Manzanares, now before this court as Manzanares v. New Mexico, U.S.S.Ct. Docket No. 83-6361 (Feb. 27, 1984)

viable in light of various double jeopardy decisions of this court.⁷

(Appendix "A-1", p. 2)

Petitioner did not request a rehearing and this Petition for Certiorari is timely filed if filed on or before April 30, 1984.

III. REASONS FOR GRANTING THE WRIT

The New Mexico Supreme Court has rendered a decision in this case which is in conflict with decisions of other state courts of last resort and with decisions of federal courts of appeal on the issue of whether the "jurisdictional exception" followed in New Mexico has been rejected by implication in Waller v. Florida, 397 U.S. 387 (1970) supra and Illinois v. Vitale. In addition, the New Mexico Supreme Court has decided this important question of federal law and the question has not been expressly settled by this Court.

The sole issue in this case is whether the courts of New Mexico are required to follow federal law on this issue of "jurisdictional exception" or whether, as the State Supreme Court suggests, they must follow State v. James, supra, which holds that double jeopardy does not attach if the lower court which tried a petitioner on the lesser offenses does not have jurisdiction to try the greater crime which arises out of the same transaction.

In the James case, the New Mexico Supreme Court held that Waller v. Florida, did not preclude application of the "jurisdictional exception" doctrine which New Mexico followed because "[t]he Waller decision stands for the proposition that two courts within a state -- district and municipal -- cannot each try a person for the same crime. However, the Supreme Court recognized the possible existence of exceptions to the rule." State v. James, 93 N.M. at 607, 603 P.2d at 717.

⁷As shown in Appendix "A-1" the courts considered two cases in which the identical issue of the "jurisdictional exception" arose. The case of State v. Padilla, No. 15,098 is not part of this petition because defendant although indigent, could not be located by the Public Defender Department to secure the necessary affidavits of indigency required by the Rules of this Court. However, the Padilla issue is identical except that the "greater" and "lesser" offenses were "battery on a police officer" and "resisting arrest by fighting." (See "A-1" p. 1)

In Robinson v. Neil, 409 U.S. 505 (1973) this Court held that Waller was fully retroactive, but did not mention the jurisdictional exception although it was clearly raised by the facts. See Robinson v. Neil, 366 F.Supp. 924 (E.D. Tenn. 1973). Nor did Brown v. Ohio, 432 U.S. 161 (1977) consider the jurisdictional exception even though the court discussed another exception found in Diaz v. United States, i.e., where the State is unable to proceed on the greater charge because "necessary facts" to sustain that charge have not occurred or have not been discovered. Brown, n. 7.

The New Mexico Supreme Court, in considering Illinois v. Vitale, concluded that the issue of jurisdictional exception was not raised and Vitale is, therefore, inapplicable. (Appendix A-1, pp. 3-4)

In the Manzanares case, now before this Court, the state Court of Appeals had noted: "It is well recognized that the jurisdictional exception first stated in Diaz is untenable in light of Waller." Although federal law on the Diaz notion of jurisdictional exception is very limited, those cases which have considered the question conflict with the New Mexico Supreme Court opinion in this case.

In Culbertson v. Wainwright, 453 F.2d 1219 (5th Cir. 1972) cert. denied (1972), the court specifically addressed the doctrine of "jurisdictional exception" which New Mexico has adopted. The court stated that "[a]t least by implication, this [jurisdictional exception] proposition has been rejected in Waller." Id. at 1220. See also Abramson v. Griffin, 693 F.2d 1909 (10th Cir. 1982); United States v. Walking Crow, 560 F.2d 386 (8th Cir. 1977), cert. denied 435 U.S. 953 (1977).

In Robinson v. Neil, supra, the district court noted that the jurisdictional exception was not available to the state in order to put petitioner twice in jeopardy. The court held that the state could not, by limiting the jurisdiction of its courts, deny any individual his constitutional right not to be twice placed in jeopardy for the same offense. The district court in Robinson addressed the very concern expressed by New Mexico Supreme Court in Manzanares, supra and impliedly

in this case that the "jurisdictional exception" serves to protect the State from abuse by defendants who take advantage of the administrative miscommunications which are found in a two tier judicial system. However, the court rejected this administrative problem as an excuse to twice put defendants in jeopardy. Quoting State v. Engle, 458 F.2d 1021 at 1025 (6th Cir. 1972) the court stated:

The double jeopardy clause is intended to prevent vexatious, piecemeal prosecution whether the result of an intent to harass, a desire to have more than one shot at obtaining a conviction or severe sentence, a mere prosecutorial caprice or carelessness.

The court in Robinson went on to state at 366 F.Supp. at 329:

The decision reached herein does not impose an undue hardship on the State. It merely requires that the prosecution of individuals accused of criminal activity be managed in such a way that those individuals are not forced to climb a ladder of multiple criminal prosecutions from the "least" included offense to the greatest. In this regard, any breakdowns in communications between state and municipal officials forms no justification for depriving an accused persons of his right to plead double jeopardy. See Waller v. Florida, supra. (emphasis added)

In Pettyjohn v. Evatt, 3e9 F.Supp. 865 (E.D. Tenn. 1974), affirmed 500 F.2d 1403 (6th Cir. 1974), the district court which decided the Robinson case reaffirmed its rejection of the "jurisdictional exception" which is followed by New Mexico in this case.

In State v. Burroughs, 254 S.E.2d 144 (Ga.App. 1979), reversed 260 S.E.2d 5 (1979), vacated 448 U.S. 903 (1980), opinion on remand 271 S.E.2d 629 (1980), the State argued in the Georgia Court of Appeals that because the court of limited jurisdiction tried petitioner for a crime which would not be a crime at the state level, the state court would not have had jurisdiction to try petitioner for the crime charged at the municipal court and, therefore, double jeopardy could not be invoked by the petitioner. The Georgia Court of Appeals rejected this claim of jurisdictional exception. The Georgia Supreme Court reversed the Court of Appeals and the petitioner petitioned for certiorari to the United States Supreme Court. This Court vacated the judgment of the Georgia Supreme Court and remanded for reconsideration in light of Illinois v. Vitale, supra. On remand, the Georgia Court affirmed the Court of Appeals opinion reversing Burroughs' conviction.

It is evident that state courts from other jurisdictions which have considered claims that the "jurisdictional exception" of Diaz is still viable have rejected it in light of Waller v. Florida, supra; Illinois v. Vitale, supra or Brown v. Ohio, supra. See e.g. State v. Diveley, 458 A.2d 509 (N.J. 1983); State v. Foy, 401 So.2d 948 (La. 1981); State v. Houser, 626 P.2d 256 (Mont. 1981); Matter of Castillo, 293 N.W.2d 839 (Minn. 1980); State v. Laguna, 602 P.2d 847 (Ariz.App. 1979); People v. Lasek, 405 N.Y.S.2d 991 (N.Y. Co. Ct. 1978); People v. Comingore, 570 P.2d 923 (Cal. 1977); State v. Anonymous, 329 A.2d 136 (Conn. 1976); Rouzie v. Commonwealth, 207 S.E.2d 854 (Va. 1974); State ex rel. Seal v. Shepard, 299 So.2d 644 (Fla.App. 1974); Benard v. State, 481 S.W.2d 427 (Tex.Crim.App. 1972).



It is undisputed that, in this case, the prosecution of this case in municipal court and, subsequently, in the district court was the responsibility of one prosecution office -- the office of the district attorney for the Fifth Judicial District. If, in fact, there was any miscommunication between the District Attorney's office and the police who filed the criminal complaint in Carlsbad Municipal Court, that miscommunication is attributable to the State and its agents, not petitioner. The law is clear that the prosecutor is held to the knowledge of its own agents. See, Brady v. Maryland, 373 U.S. 83 (1963); Smith v. Florida, 410 F.2d 1349, 1351 (5th Cir. 1969); Barbee v. Warden, 331 F.2d 841, 846 (4th Cir. 1964). In this factual setting, it would have been impossible for petitioner to abuse New Mexico's multi-level judicial system unless the prosecutor's office, through its own devices or through carelessness, chose not to be aware of the charges in municipal court. Thus, the state court's rationale, as stated in Manzanares, for the jurisdictional exception is not applicable to this case. The only result of applying the jurisdictional exception to this case is to make petitioner "climb up the ladder," Robinson v. Neil, supra, from the lesser to the greater offense and to reward prosecutorial caprice or carelessness. See, State v. Engle, supra at 1025.

The New Mexico Supreme Court's decision in this case reflects not only conflict with the substantive protections of the Double Jeopardy Clause, but apparent disregard for the precedents of this Court in Illinois v. Vitale, and Waller v. Florida.

CONCLUSION AND PRAYER

Petitioner prays that this Honorable Court issue its writ to the New Mexico Supreme Court and grant review of his conviction in this cause.

Respectfully submitted,


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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

CHARLES FUGATE,

Petitioner,

vs.

No.

STATE OF NEW MEXICO,

Respondent.

APPENDIX

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Petitioner,
vs.
GEORGE PADILLA,
Respondent.

NO. 15,098
SUPREME COURT OF NEW MEXICO
FILED
MAR - 1 1984
Rose Marie Aldrete

STATE OF NEW MEXICO,
Petitioner,
vs.
CHARLES FUGATE,
Respondent.

NO. 15,127

ORIGINAL PROCEEDINGS ON CERTIORARI

PAUL BARDACKE, Attorney General ANTHONY TUPLER, Assist. Atty. Gen. Santa Fe, NM	For Petitioner
JANET CLOW, Chief Public Defender HENRY R. QUINTERO, Assist. App. Defender Santa Fe, NM	For Respondent Padilla
LINDA FISCHER Hobbs, NM	For Respondent Fugate

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OPINION

FEDERICK, Chief Justice.

These cases have been consolidated since they present the same principal question on appeal. Both of these cases, State v. Padilla and State v. Fugate, involve the question of whether the "jurisdictional exception," as applied to double jeopardy claims, is still the law in New Mexico. We hold that it is.

Defendant Padilla was involved in an altercation with several police officers which resulted from Padilla's attempt to avoid arrest. While two officers were attempting to handcuff Padilla, he kicked a third officer in the groin. Padilla was charged with felony battery on a police officer as well as several misdemeanors, including resisting arrest. Padilla pled guilty to the misdemeanors in magistrate court. At the district court trial on the felony count Padilla moved to dismiss on grounds of double jeopardy, claiming that resisting arrest and battery on a police officer are the "same offense" for double jeopardy purposes. The trial court denied the motion because it found that the jurisdictional exception was applicable in this case. Padilla appealed his conviction to the Court of Appeals. The Court of Appeals found that the jurisdictional exception was not the law in New Mexico and reversed the conviction. The State brought the case before this Court on writ of certiorari. We reverse.

Defendant Fugate was involved in a three-vehicle accident which caused great bodily harm, followed by death, to a passenger of one of the other vehicles. Fugate entered a plea of nolo contendere to charges of DWI and careless driving in municipal court. He was found guilty and sentenced to alcohol treatment. Fugate was subsequently tried and convicted of homicide by vehicle in the district court. Fugate appealed his conviction, claiming that the second trial was barred on double jeopardy grounds. The Court of Appeals reversed Fugate's conviction and the State brought the case before this Court on writ of certiorari. We reverse.

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2 We have recently addressed the question of whether the jurisdictional
3 exception, as adopted in State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950) and
4 State v. James, 93 N.M. 605, 603 P.2d 715 (1979), is still applicable in New Mexico
5 in light of the recent United States Supreme Court opinion of Illinois v. Vitale,
6 447 U.S. 410 (1980). We held that there was no compelling reason to overrule
7 James. State v. Manzanares, 23 SBB 9 (1983).

8 The records in each of the cases before us show that the district courts
9 properly denied motions to dismiss the felony charges on double jeopardy grounds.
10 The Court of Appeals is reversed in each case. The causes are remanded for
11 further proceedings consistent with this opinion and with the holding of State v.
12 Manzanares, Id.

13 The Court of Appeals opinion on the second issue in Padilla, concerning
14 instructions on simple battery, is proper and correct and the court is affirmed on
15 this issue.

16 The Court of Appeals opinion in Fugate concerning the necessary facts
17 exception is also proper and correct. However, in light of our holding with
18 respect to the jurisdictional exception, it is not necessary to reach the "necessary
19 facts" question in Fugate.

20 IT IS SO ORDERED.

21 William R. Federici
22 WILLIAM R. FEDERICI, Chief Justice

23 WE CONCUR:

24 DAN SOSA, JR., Senior Justice

25 WILLIAM RIORDAN, Justice

26 HARRY E. STOWERS, Jr., Justice

1
2 IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO
3 STATE OF NEW MEXICO,
4 Plaintiff-Appellee,

5 v. No. 7113

6 CHARLES FUGATE,
7 Defendant-Appellant.

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15 APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
16 FORT, Judge
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24 PAUL BARDACKE, Attorney General
25 ANTHONY TUPLER, Assistant Attorney General
26 Santa Fe, New Mexico Attorneys for Plaintiff-Appellee
27 LINDA FISHER
28 Hobbs, New Mexico Attorney for Defendant-Appellant

OPINION

WALTERS, Chief Judge.

Defendant was charged with homicide by vehicle. His first trial resulted in a conviction, and it was overturned by this court on appeal. Upon remand for a second trial, he was again found guilty. On this appeal, we initially calendared the case for summary reversal. The State filed a memorandum in opposition to the proposed calendaring, and we reassigned the matter to the legal calendar. Defendant's statement of the issue presented is:

Whether double jeopardy precludes a prosecution for Homicide by Vehicle concerning an incident where the defendant has previously been convicted of Driving While Intoxicated and Careless Driving.

The question arises because defendant was convicted in Carlsbad Municipal Court, on pleas of nolo contendere, of careless driving and driving while under the influence of alcohol (DWI), in violation of municipal ordinances. The charges followed a three-car collision on August 12, 1981; the municipal court convictions were had on August 13th. On September 5, 1981, one of the persons injured in the accident died. On September 11, 1981, defendant was charged by criminal information in district court with vehicular homicide, the charge being made alternatively in the language of the statute, NMSA 1978, § 66-8-101 (Cum.Supp.1982), and of NMSA 1978, UJI Crim. 2.60 (Repl.Pamp.1982), to assert death or great bodily injury resulting from defendant's unlawful operation of a motor vehicle. Defendant filed a motion to dismiss on grounds of double jeopardy on February 1st; the jury was selected on February 2nd and a verdict returned on February 3rd. Although the record does not reflect a ruling by the court on defendant's motion, it is apparent from the course of proceedings that it was denied.

In our initial calendaring of this case, we relied on the statements of the docketing statement (which, if not challenged, are taken as true) to infer that the municipal and state offenses of careless and reckless driving were the same for

double jeopardy purposes. In its memorandum in opposition, the State accepted that inference, and asserted only that the exceptions of *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912), i.e., jurisdictional and lack of necessary facts, removed this case from a double jeopardy consideration.

We have recently twice discussed, in *State v. Padilla*, No. 7032 (Ct.App.1983), and *State v. Manzanares*, No. 7107 (Ct.App.1983), the unmistakable rejection by the United States Supreme Court of the *Diaz* "jurisdictional exception." We agree with defendant that a jurisdictional exception does not exist.

Under NMSA 1978, § 66-8-101(C), vehicular homicide can be committed only by reckless driving or DWI. The State has, in effect, conceded that reckless and careless driving are identical offenses. We do not, therefore, consider whether careless driving is a necessarily included lesser offense of reckless driving. See *State v. Pohl*, 89 N.M. 523, 554 P.2d 984 (Ct.App.1976). We address, instead, the State's only argument—that the *Diaz* "necessary facts" exception supports the district court conviction. It contends that although defendant could have been charged with great bodily injury under § 66-8-101 at the time he was charged with careless driving and DWI in municipal court, he could not have been charged at that time for causing death by vehicle under the same statute because the death had not yet occurred.

There is irrefutable logic in the State's position insofar as the death did not occur until after the municipal court convictions. But it does not alter the more significant fact that a single statute, § 66-8-101, condemns both death-by-vehicle and great-bodily-injury-by-vehicle, and imposes the same penalty for either violation. It is equally undisputed that either offense under § 66-8-101 can only be committed by reckless driving or by DWI. Defendant was once convicted in municipal court of DWI arising out of the identical incident upon

1 which defendant was later charged in district court; he cannot be tried again of a
2 charge requiring proof of the identical conduct upon which he already has been
3 convicted. State v. Padilla. The same rationale applies to the conviction for
4 careless driving because the State has, by acquiescence, agreed that conviction of
5 that offense in municipal court was tantamount to a conviction for reckless
6 driving.

7 Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), was
8 concerned with a claim of double jeopardy for a later prosecution on auto theft
9 following conviction of joyriding. But at footnote 7 in Brown, it was suggested
10 that the "necessary facts" exception of Diaz might exist "where the State is
11 unable to proceed on the more serious charge at the outset because the additional
12 facts necessary to sustain that charge have not occurred or have not been
13 discovered despite due diligence." If the exception really applies to a "more
14 serious charge," as Brown would indicate, rather than only to a charge which
15 embraces a "lesser included offense," we have no difficulty in holding that the
16 Diaz exception is not a factor in this case. Death-by-vehicle is not a "more
17 serious charge" than great-bodily-injury-by-vehicle.

18 Applying the language of Brown literally, we conclude that defendant could
19 have been charged with and convicted in district court of inflicting great-bodily-
20 injury-by-vehicle under § 66-8-101 at the time he was charged in municipal court.
21 If convicted, he would have been subject to the same penalty as would have
22 applied had he not been tried in municipal court and had charges ultimately been
23 brought instead for death-by-vehicle under that statute. The State had nothing to
24 lose by filing "great-bodily-injury" charges in district court at the time of the
25 accident upon the facts then known. Under those circumstances, no reliance on
26 the "necessary facts" exception of Diaz, upon which rests excuse from filing the
27 death-by-vehicle charges at the time, would have been required. Sufficient facts
28

1 already were known to permit the filing of the alternative offense of great-
2 bodily-injury-by-vehicle under the same statute; that charge would have borne the
3 same felony conviction and the same felony penalty as would conviction of the
4 alternative statutory offense of death-by-vehicle. Section 66-8-101 makes clear
5 that the legislative concern is the infliction of harm as a result of defendant's
6 unlawful conduct; and whether the harm done results in great bodily injury or in
7 death, it is the defendant's conduct, not the result, that incurs equal punishment
8 for either kind of harm.

9 Stated otherwise, death-by-vehicle is not a "greater charge" nor a "more
10 serious charge" than great-bodily-injury-by-vehicle. Consequently, once defendant
11 was convicted of the municipal court offenses underlying either of the district
12 court alternative charges under § 66-8-101, there was no absence of "necessary
13 facts" which would have preserved the charge of death-by-vehicle from the
14 prohibition of double jeopardy.

15 The conviction and sentence are reversed and defendant is ordered
16 discharged.

17 IT IS SO ORDERED.

18 Mary C. Walters, C.J.
19 Mary C. Walters

20 WE CONCUR:

21 William R. Hendley, J.
22 William R. Hendley

23 C. Fincher Neal, J.
24 C. Fincher Neal

35-14-1. Municipal court; creation.

There is established a municipal court in each incorporated municipality. The municipal courts shall be presided over by municipal judges. As used in Sections 35-14-1 to 35-14-9 and 35-15-1 to 35-15-14 NMSA 1978, "municipality" includes H-class counties.

History: 1953 Comp., § 37-1-1, enacted by Laws 1961, ch. 208, § 1; 1967, ch. 213, § 1; 1968, ch. 62, § 152.

Repeal. — Laws 1961, ch. 208, § 11, repeals former 37-1-1 to 37-1-9, 1953 Comp., relating to the creation of a police court in cities and towns, defining its jurisdiction, providing for the election of a police judge, providing for statements and the filling of vacancies.

When judgment may be vacated. — A police magistrate court does not have authority to vacate a judgment rendered by it in the course of its jurisdiction, absent any question of fraud practiced on said court. 1957-58 Op. Att'y Gen. No. 58-3 (opinion rendered under former law).

Validity of ordinance regulating officeholding. — A municipal ordinance which provides that a municipal

judge shall not hold any other state, county, city or precinct office or position is valid. 1961-62 Op. Att'y Gen. No. 62-106 (opinion rendered under former law).

Where offices not incompatible. — The office of a municipal magistrate is not incompatible with that of the city clerk under 3-12-4 NMSA 1978. There is no inconsistency of function, no subordination and no interference as long as the clerk is not charged with enforcing any municipal ordinance. If either office is full time, however, a physical incompatibility exists. 1967 Op. Att'y Gen. No. 67-74.

Am. Jur. 2d and C.J.S. references. — 20 Am. Jur. 2d Courts § 30.

21 C.J.S. Courts § 278.

35-14-2. Jurisdiction.

A. Each municipal court has jurisdiction over all offenses and complaints under ordinances of the municipality and may issue subpoenas and warrants and punish for contempt.

B. Upon written agreement between the board of regents of a state educational institution designated in Article 12, Section 11 of the constitution of New Mexico and the governing body of a municipality contiguous to land under control of the board of regents or within which any portion of such land is located, the municipal court has jurisdiction over violations of campus traffic regulations adopted under Section 29-5-1 NMSA 1978 as to areas under control of the board of regents. Fines and forfeitures collected by the municipal court under campus traffic regulations may be credited to the state educational institution on whose campus the violation occurred.

History: 1953 Comp., § 37-1-2, enacted by Laws 1961, ch. 208, § 2; 1969, ch. 131, § 1; 1975, ch. 167, § 1.

Repeal. — See same catchline in notes to 35-14-1 NMSA 1978.

Scope of jurisdiction. — A municipal judge is limited in the exercise of his jurisdiction to those offenses arising out of violations or alleged violations of municipal ordinances. In addition, jurisdiction of municipal judges extends only to offenses perpetrated within the limits of the particular municipality. 1961-62 Op. Att'y Gen. No. 62-141.

Original jurisdiction is exclusive. — Only municipal courts have original jurisdiction to hear violations of municipal ordinances. 1965 Op. Att'y Gen. No. 65-236.

Jurisdiction to issue search warrants. — A municipal judge has the power and authority to issue valid search warrants where the evidence to be seized will be used to prosecute violations of municipal ordinances, but not where the seized evidence will be used to prosecute violations of state laws. 1970 Op. Att'y Gen. No. 70-45.

At university. — Ordinances of the city of Albuquerque dealing with crimes do not apply to land under the control of the board of regents of the

university of New Mexico except for traffic offenses. 1969 Op. Att'y Gen. No. 69-48.

As to state Motor Vehicle Code. — Unless the town has specifically enacted an ordinance inclusive of the motor vehicle offenses contained in the state traffic code, a municipal judge does not have jurisdiction to hear and try those traffic offenses contained in the state Motor Vehicle Code (66-1-1 NMSA 1978 et seq.) which are not actually covered by the particular town ordinance. 1961-62 Op. Att'y Gen. No. 62-141.

Other sections supplemented. — This section provides for a waiver of the right to regulate university property under agreement between boards of regents of state educational institutions and municipalities for traffic offenses occurring on the university campus and supplements 29-5-1 and 29-5-2 NMSA 1978. 1969 Op. Att'y Gen. No. 69-48.

Where no right to trial by jury. — No right of trial by jury exists in municipal court "petty" or "minor" cases arising from the violation of city ordinances. 1964 Op. Att'y Gen. No. 64-37.

Am. Jur. 2d and C.J.S. references. — 30 Am. Jur. 2d Courts § 30.

21 C.J.S. Courts §§ 11, 131, 260 to 300.

History: 1953 Comp., § 36-15-3, enacted by Laws 1975, ch. 242, § 10; 1981, ch. 271, § 1.

The 1981 amendment added "judgment" at the end of the catchline and added Subsection C.

Effective dates. — Laws 1981, ch. 271, contains no effective date provision, but was enacted at the session which adjourned on March 21, 1981. See N.M. Const., art. IV, § 23.

After jury trial in magistrate court, defendant

not entitled to jury in trial de novo in district court. State v. Haar, 94 N.M. 539, 612 P.2d 1250 (Ct. App.), cert. denied, 449 U.S. 1063, 101 S. Ct. 787, 66 L. Ed. 2d 606 (1980).

District judge may not enhance sentence received in magistrate court. State v. Haar, 94 N.M. 539, 612 P.2d 1350 (Ct. App.), cert. denied, 94 N.M. 574, 615 P.2d 991, cert. denied, 449 U.S. 1063, 101 S. Ct. 787, 66 L. Ed. 2d 606 (1980).

ARTICLE 14

Municipal Courts

Sec.

35-14-1. Municipal court, creation.

35-14-2. Monthly reports and remittances.

Sec.

35-14-11. Municipal ordinance, court costs, collection; purpose.

35-14-1. Municipal court; creation.

Except for municipalities lying within the boundaries of a class A county with a population of more than two hundred thousand persons in the last federal decennial census, there is established a municipal court in each incorporated municipality. The municipal courts shall be presided over by municipal judges. As used in Sections 35-14-1 through 35-14-9 and 35-15-1 through 35-15-14 NMSA 1978, "municipality" includes H class counties.

History: 1953 Comp., § 37-1-1, enacted by Laws 1961, ch. 208, § 1; 1967, ch. 213, § 1; 1968, ch. 62, § 152; 1979, ch. 346, § 12.

The 1979 amendment added the exception at the beginning of the first sentence and made other minor changes.

Effective dates. — Laws 1979, ch. 346, § 14, makes the act effective on July 1, 1980.

Laws 1980, ch. 142, § 12A, makes § 7 of the act effective on July 1, 1980.

Temporary provisions. — Laws 1980, ch. 142, § 7, provides that 34-8A-3 and 34-8A-4A NMSA 1978

and this section shall not be applicable to municipalities having a population of less than 5,000 persons, until the terms of the current municipal judges end and, at that time, the metropolitan court shall have jurisdiction over offenses of those municipalities, or until such time as the governing bodies of those municipalities inform them that by resolution of the governing body the municipal courts in those jurisdictions are no longer in operation, whichever is earlier.

Repealing clauses. — Laws 1979, ch. 346, § 13, repeals 34-8-1 to 34-8-13 and 35-1-4 NMSA 1978.

35-14-2. Jurisdiction.

Municipal judge is public officer for purposes of N.M. Const., art. IV, § 27. 1979 Op. Att'y Gen. No. 79-27.

35-14-4. Election; term; vacancy.

Municipal judge is public officer for purposes of N.M. Const., art. IV, § 27. 1979 Op. Att'y Gen. No. 79-27.

35-14-7. Monthly reports and remittances.

Each municipal judge shall make monthly written reports to the governing body of all money collected by him; provided he shall account separately for costs collected pursuant to Section 35-14-11 NMSA 1978. The reports shall be filed and the money collected shall be paid to the municipality not later than the tenth day of the month following collection.

History: 1953 Comp., § 37-1-7, enacted by Laws 1961, ch. 208, § 7; 1983, ch. 134, § 8.

The 1983 amendment inserted the proviso clause at the end of the first sentence.

Effective dates. — Laws 1983, ch. 134, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Sec.
66-8-117. Penalty assessment misdemeanors; option; effect.
66-8-118. Repealed.
66-8-119. Penalty assessment revenue; disposition.
66-8-122. Immediate appearance before magistrate.
66-8-123. Conduct of arresting officer; notices by citation.
66-8-128. Uniform traffic citation; face.
66-8-129. Uniform traffic citation; back.
66-8-130. All traffic citations to conform; municipal

Sec.
66-8-135. Record of traffic cases.
66-8-137.1. Nonresident Violator Compact; form.
66-8-137.2. Nonresident Violator Compact; definitions.
66-8-137.3. Compact administrator; compensation.
66-8-137.4. Bilateral agreements; noncompact jurisdictions; authority.

PART 1

OFFENSES RELATING TO REGISTRATION

66-8-7. Penalty for misdemeanor.

Motor vehicle misdemeanor may involve jury trial. — Persons charged with offenses classified as misdemeanors under the Motor Vehicle Code may under Rule 23, N.M.R. Crim. P. (Magis. Ct.) demand a jury trial but are not afforded one as a matter of right. 1979 Op. Att'y Gen. No. 79-17.

Magistrate may order restitution. — The magis-

trate may, as part of its sentencing power, order a Criminal Code or Motor Vehicle Code violator to make restitution. 1979 Op. Att'y Gen. No. 79-18.

For discussion of legislative history of this section, see *State v. Barela*, 95 N.M. 349, 622 P.2d 254 (Ct. App. 1980).

66-8-9. Penalty for felony.

Any person convicted of violating any provision of the Motor Vehicle Code [Articles 1 to 8, Chapter 66 NMSA 1978] declared a felony, and punishment is not specified, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: 1953 Comp., § 64-8-9, enacted by Laws 1978, ch. 35, § 507; 1981, ch. 12, § 1.

The 1981 amendment substituted "is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978" for "shall be punished by imprisonment for not less than one year nor more than five years or by a fine of not less than five hundred dollars (\$500) nor more than five thousand dollars (\$5,000) or both."

Emergency clauses. — Laws 1981, ch. 12, § 3,

makes the act effective immediately. Approved March 5, 1981.

Applicability. — Laws 1981, ch. 12, § 2, makes the provisions of the act applicable only to persons sentenced for crimes committed on or after its effective date.

For discussion of legislative history of this section, see *State v. Barela*, 95 N.M. 349, 622 P.2d 254 (Ct. App. 1980).

PART 2

TRAFFIC OFFENSES

66-8-101. Homicide by vehicle; great bodily injury by vehicle.

A. Homicide by vehicle is the killing of a human being in the unlawful operation of a motor vehicle.

B. Great bodily injury by vehicle is the injuring of a human being, to the extent defined in Section 30-1-12 NMSA 1978, in the unlawful operation of a motor vehicle.

C. Any person who commits homicide by vehicle or great bodily injury by vehicle while under the influence of intoxicating liquor or while under the influence of any drug or while violating Section 66-8-113 NMSA 1978 is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978, provided that violation of speeding laws as set forth in the Motor Vehicle Code [Articles 1 to 8, Chapter 66 NMSA 1978] shall not per se be a basis for violation of Section 66-8-113 NMSA 1978.

History: 1953 Comp., § 64-8-101, enacted by Laws 1978, ch. 35, § 508; 1981, ch. 370, § 1; 1983, ch. 78, § 1.

I. General Consideration.
II. Double Jeopardy.
III. Reckless or Intoxicated.

I. GENERAL CONSIDERATION.

The 1981 amendment added "great bodily injury by vehicle" at the end of the catchline, inserted present Subsection B, redesignated former Subsection B as present Subsection C and, in that subsection, added the second sentence and inserted "or great bodily injury by vehicle" and "fourth degree" in the first sentence.

The 1983 amendment substituted "vehicle" for "vehicles" in two places in the catchline and, in Subsection C, added "while under the influence of intoxicating liquor or while under the influence of any drug or," deleted "66-8-102 or" after "while violating Section," substituted "third" for "fourth" near the middle of the subsection and added "and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978."

Effective dates. — Laws 1981, ch. 370, contains no effective date provision, but was enacted at the session which adjourned on March 21, 1981. See N.M. Const., art. IV, § 23.

Laws 1983, ch. 78, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Applicability of section. — This section applies when the vehicular killing is while driving under the influence of intoxicating liquor, while driving under the influence of drugs or while driving recklessly. *State v. Montoya*, 93 N.M. 346, 600 P.2d 292 (Ct. App.), cert. quashed, 92 N.M. 539, 591 P.2d 286 (1979).

Unborn viable fetus is not a human being for purposes of vehicular homicide. *State v. Willis*, 98 N.M. 771, 652 P.2d 1222 (Ct. App. 1982).

The killing of a fetus, under the common law, was not homicide unless the fetus had been born alive; until born alive, there was no human being. *State v. Willis*, 98 N.M. 771, 652 P.2d 1222 (Ct. App. 1982).

Only killings involving violation of 66-8-102 or 66-8-113 NMSA 1978 are declared felonies, with punishment under 66-8-9 NMSA 1978; other killings, not declared to be felonies, are misdemeanors with punishment under 66-8-7B NMSA 1978. *State v. Barela*, 95 N.M. 349, 622 P.2d 254 (Ct. App. 1980).

Law reviews.

For comment, "Two-Tiered Test for Double Jeop-

ardy Analysis in New Mexico," see 10 N.M.L. Rev. 195 (1979-80).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

II. DOUBLE JEOPARDY.

Defendant cannot evade vehicular homicide prosecution simply by volunteering for alcohol-related offenses school or by paying a nominal fine for a lesser charge in municipal court and later claiming double jeopardy. *State v. James*, 93 N.M. 605, 603 P.2d 718 (1979).

When double jeopardy not applicable. — Where jurisdiction was lacking over an involuntary manslaughter alleged in a children's court proceeding, such allegation provides no basis for a double jeopardy claim in a subsequent prosecution. *State v. Montoya*, 93 N.M. 346, 600 P.2d 292 (Ct. App.), cert. quashed, 92 N.M. 532, 591 P.2d 286 (1979).

But where applicable. — Convictions in the municipal court for both driving while under the influence of alcohol and reckless driving barred prosecution of defendant in district court for homicide by vehicle on double jeopardy grounds, since the greater offense could not have been committed without also committing the two lesser offenses. *State v. James*, 94 N.M. 7, 606 P.2d 1101 (Ct. App. 1979).

III. RECKLESS OR INTOXICATED.

Blood alcohol percentage material to state's conviction. — Where the state's conviction for vehicular homicide is based primarily upon defendant's driving under the influence of intoxicating liquor, his blood alcohol percentage is clearly material to his guilt or innocence. *State v. Levato*, 94 N.M. 780, 617 P.2d 169 (Ct. App. 1980).

Admission of blood test results found not to be error. — See *State v. Sanchez*, 98 N.M. 781, 652 P.2d 1232 (Ct. App. 1982).

66-8-102. Persons under influence of intoxicating liquor or drugs; penalty.

A. It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this state.

B. It is unlawful for any person who is under the influence of any drug to a degree which renders him incapable of safely driving a vehicle to drive any vehicle within this state.

C. It is unlawful for any person who has one-tenth of one percent or more by weight of alcohol in his blood to drive any vehicle within this state.

D. Every person under first conviction under this section shall be punished by imprisonment for not less than thirty days nor more than ninety days or by a fine of not less than three hundred dollars (\$300) nor more than five hundred dollars (\$500), or both, provided that if the sentence is suspended in whole or in part or deferred, the period of probation may extend beyond ninety days but shall not exceed three years. On a first conviction under this section, any time spent in jail for the offense prior to the conviction for that offense shall be credited to any term of imprisonment fixed by the court.

Use Note

1. For use, if applicable, in conjunction with Instruction 2.50.

Committee commentary. — See *State v. Ramirez*, 79 N.M. 475, 444 P.2d 986 (1968); *Territory v. Yee Dan*, 7 N.M. 439, 37 P. 1101 (1894). See generally Annot., 100 A.L.R.2d 769, 783 (1965).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide § 19.

Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant, 100 A.L.R.2d 769.
40 C.J.S. Homicide § 11.

UJI Crim. 2.53. Homicide; unlawful injury accelerating death.¹

One who kills is not relieved of responsibility even though the victim [was previously weakened by disease, injury or physical condition, and even if it appears probable that a person in sound physical condition would not have died from the injury]² [would have died soon thereafter from another cause and the injury merely hastened the death].

Use Note

1. For use in conjunction with Instruction 2.50.
2. Use only the applicable bracketed phrase.

Committee commentary. — See generally LaFave & Scott, *Criminal Law* 257 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide § 16.
40 C.J.S. Homicide § 11.

UJI Crim. 2.54. Intent to kill one person; another killed.¹

When one intends to kill or injure a certain person, and by mistake or accident kills a different person, the crime, if any, is the same as though the original intended victim had been killed. In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.

Use Note

1. Insert this instruction immediately after the instruction on the elements of the crime. This instruction is not necessary if the state has charged and introduced evidence of the crime of first degree murder by a deliberate design to effect the death of any human being. In that event, the bracketed phrase described in Use Note No. 2 of Instruction 2.00 supplies the necessary "transferred intent" instruction.

Committee commentary. — As indicated in the use note, this instruction is not necessary for instructing on first degree murder resulting from a deliberate design to effect the death of any human being. See § 30-2-1A(5) NMSA 1978. This instruction can be used for other first degree murder or for second degree murder. See *State v. Ochoa*, 61 N.M. 225, 297 P.2d 1053 (1956), and *State v. Wilson*, 39 N.M. 284, 46

P.2d 57 (1935). See generally LaFave & Scott, *Criminal Law* 252-53 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide §§ 498, 506, 534, 535.

Homicide by unlawful act aimed at another, 18 A.L.R. 917.

40 C.J.S. Homicide § 18.

VEHICLE HOMICIDE

UJI Crim. 2.60. Vehicle homicide; great bodily harm; essential elements.

For you to find the defendant guilty of causing [death] [or] [great bodily harm]¹ by vehicle [as charged in Count]², the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle³
[while an habitual user of, a narcotic drug]
[while under the influence of intoxicating liquor]⁴
[while under the influence of, a narcotic drug]⁵
[while under the influence of any drug to a degree that rendered him incapable of driving safely]⁶
[recklessly];⁶
2. The defendant thereby caused⁷ the [death] [or] [great bodily harm]¹ of
.
name of victim ;
3. This happened in New Mexico on or about the day of, 19

Use Note

1. Use only applicable alternative or alternatives. If defendant is charged with great bodily harm by vehicle, the definition of "great bodily harm," Instruction 1.21, must also be given.
2. Insert the count number if more than one count is charged.
3. Use the bracketed alternatives that are applicable.
4. Instruction 2.62 must also be used if the results of the chemical test, introduced under Section 66-8-110 NMSA 1978 are used to establish a presumption concerning the influence of alcohol. Instruction 2.63, Vehicle homicide; "driving under the influence of intoxicating liquor;" defined, must also be given if this element is given.
5. Instruction 2.63, Vehicle homicide; "driving under the influence of intoxicating liquor;" defined, must also be given if this element is given.
6. Instruction 2.61, the definition of reckless driving, must also be used.
7. If causation is in issue, Instruction 2.50, the definition of causation, must also be used. [As amended, effective June 19, 1981.]

Committee commentary. — See 66-8-101 to 66-8-113 NMSA 1978. This crime is a fourth degree felony. See 31-18-11 NMSA 1978. It is a general intent crime. *State v. Jordan*, 63 N.M. 571, 494 P.2d 984 (Ct. App. 1972). The use of a vehicle to commit a homicide may under certain circumstances result in a charge of murder. See, e.g., *State v. Montoya*, 72 N.M. 178, 381 P.2d 963 (1963); see generally, Annot., 21 A.L.R.3d 116 (1968).

Driving while intoxicated must be the direct and proximate cause of the death when the homicide is based on that provision. *State v. Suenos*, 42 N.M. 500, 505-06, 82 P.2d 274 (1938); *State v. Myers*, 68 N.M. 16, 536 P.2d 280 (Ct. App. 1975). However, since driving while intoxicated is an act *malum in se*, *State v. Dutchover*, 65 N.M. 72, 509 P.2d 264 (Ct. App. 1973), foreseeability is not an element of proximate cause. Compare with Instruction 2.30 and commentary.

On the theory that the homicide by vehicle is not an offense consisting of different degrees, the court of appeals has held there is no lesser included offense. For example, driving under the influence of intoxicating liquor, 66-8-102 NMSA 1978, was held not to be a lesser included offense to a vehicular homicide resulting from driving under the influence of intoxicating liquor, *State v. Trujillo*, 85 N.M. 208, 510 P.2d 1079 (Ct. App. 1973). Also, improper passing, 66-7-315 NMSA 1978, was held not to be a lesser included offense to a vehicular homicide caused by reckless driving, *State v. Villa*, 85 N.M. 537, 514 P.2d 56 (Ct. App. 1973). See also, commentary to Instruction No. 50.01.

The statute by its terms would appear to allow the conviction of a person causing a death or great bodily

harm by vehicular homicide simply because he was an habitual user of a narcotic drug without any proof that he was actually under the influence of the drug at the time of the accident. The committee had considerable doubt about the constitutionality of such a provision. Cf. *Robinson v. California*, 370 U.S. 660 (1962).

The statute, 66-8-102 NMSA 1978, does not define narcotic drug. Narcotic drugs are defined under the Controlled Substances Act for the purpose of prohibitory possession, distribution, etc. See 30-31-2P and 30-31-6 and 30-31-7 NMSA 1978. If the definition of narcotic drugs in the Controlled Substances Act is used for a definition under this crime, marijuana is not a narcotic drug. The state would have to prove that it is in the "any other drug" category under 66-8-102 NMSA 1978 and that the defendant was under its influence to such a degree so as to render him incapable of driving safely.

The statute for homicide by vehicle controls over the general, involuntary manslaughter statute and must be used. See *State v. Blevins*, 40 N.M. 367, 60 P.2d 208 (1936); *State v. Lujan*, 76 N.M. 111, 412 P.2d 405 (1966).

The 1981 amendment added "great bodily harm" following "Vehicle homicide" in the catchline; substituted "causing [death] [or] [great bodily harm]" for "homicide" following "guilty of" near the beginning of the instruction; redesignated former superscripts "1," "2" and "3" as "2," "3," and "4"; added superscript "5" to the end of the fourth and fifth paragraphs of Subdivision 1; redesignated former superscripts "4" and "5" as "6" and "7"; rewrote Subdivision 2 which formerly read "The defendant thereby caused⁵ the death of"; added Use Note 1; redesignated former Use Notes 1, 2, and 3 as Use Notes 2, 3, and 4; added the

Cross-reference. — As to original number of supreme court justices, and term and election of same, see N.M. Const., art. VI, § 4.

Compiler's Notes. — The number of justices of the supreme court was increased from three to five by Laws 1929, ch. 9, § 1 (34-2-1 NMSA 1978), under the authority granted by this section.

Staggered terms. — New Mexico Const., art. VI, § 4 and this section make clear the intent that staggered

terms be maintained for the office of supreme court judge. *State ex rel. Swope v. Mechem*, 58 N.M. 1, 265 P.2d 336 (1954).

Am. Jur. 2d and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 5, 6.

21 C.J.S. Courts § 427

Sec. 11. [Supreme court; salary of justices.]

The justices of the supreme court shall each receive such salary as may hereafter be fixed by law. (As amended September 15, 1953.)

Cross-reference. — As to salaries of justices, see 34-2-2 NMSA 1978.

The 1953 amendment, which was proposed by H.J.R. No. 15 (Laws 1953) and adopted at a special election held on September 15, 1953, with a vote of 14,727 for and 12,114 against, amended this section to provide that salaries of supreme court justices should be fixed by law. Prior to amendment, the section provided for an annual salary of \$6,000, payable quarterly.

Comparable provisions. — Idaho Const., art. V, § 17.

Iowa Const., art. V, § 9 (amendment 21);

Montana Const., art. VII, § 7.

Utah Const., art. VIII, § 20.

Wyoming Const., art. V, § 17.

Am. Jur. 2d and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 62 to 71.

21 C.J.S. Courts § 427; 48 C.J.S. Judges §§ 34 to 37.

Sec. 12. [Judicial districts; election and terms of district judges.]

The state shall be divided into eight judicial districts and a judge shall be chosen for each district by the qualified electors thereof at the election for representatives in congress. The terms of office of the district judges shall be six years.

Cross-references. — For power of legislature to increase the number of judges in any judicial district, to rearrange judicial district and increase the number thereof, see N.M. Const., art. VI, § 16. For designation of original judicial districts, see N.M. Const., art. VI, § 25. As to vacancy in office of supreme court or district court judge, see N.M. Const., art. XX, § 4. For present division of state into 13 judicial districts, and number of judges in each district, see 34-6-1, 34-6-4 to 34-6-16 NMSA 1978.

Compiler's note. — New Mexico Const., art. VI, § 16, empowers the legislature to increase the number of judges in any judicial district, and to rearrange the districts, increase the number thereof and make provision for a district judge for any additional district. Pursuant to this authority, the number of judicial districts has been increased by the legislature to 13. See 34-6-1 NMSA 1978.

Concurrent terms. — Framers of the constitution intended for the terms of district judges to begin and end at the same time. *State ex rel. Swope v. Mechem*, 58 N.M. 1, 265 P.2d 336 (1954).

District judges appointed pursuant to legislative act increasing the number of judges in certain districts and elected in the first general election following their

appointment, hold office not for six years from date of election, but only until expiration of the terms of all other district judges. *State ex rel. Swope v. Mechem*, 58 N.M. 1, 265 P.2d 336 (1954).

Comparable provisions. — Idaho Const., art. V, § 11.

Iowa Const., art. V, § 5 (amendment 21);

Montana Const., art. VII, § 7.

Utah Const., art. VIII, § 5.

Wyoming Const., art. V, § 19.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 10, 13, 14.

Right of party in course of litigation to challenge title or authority of judge or of person acting as judge, 114 A.L.R. 1207.

Court's power to remove judges, 118 A.L.R. 171; 53 A.L.R.3d 882.

Pardon as restoring judge to office forfeited by conviction, 58 A.L.R.3d 1191.

Validity and construction of constitutional or statutory provision making legal knowledge or experience a condition of eligibility for judicial office, 71 A.L.R.3d 498.

21 C.J.S. Courts § 278; 48 C.J.S. Judges §§ 12, 20 to 22.

Sec. 13. [District court; jurisdiction and terms.]

The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law, and appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts, and supervisory control over the same. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and all other writs, remedial or otherwise

in the exercise of their jurisdiction; provided, that no such writs shall issue directed to judges or courts of equal or superior jurisdiction. The district courts shall also have the power of naturalization in accordance with the laws of the United States. Until otherwise provided by law, at least two terms of the district court shall be held annually in each county, at the county seat.

- I. General Consideration.
- II. Original and Appellate Jurisdiction.
- III. Issuance of Writs.

I. GENERAL CONSIDERATION.

Cross-references. — As to terms of district court, see 34-6-2 NMSA 1978. As to appeals from magistrate courts to district courts, see 35-13-1 NMSA 1978. For provisions relating to habeas corpus, see 44-1-1 NMSA 1978 et seq. As to mandamus, see 44-2-1 NMSA 1978 et seq. As to quo warranto proceedings, see 44-3-1 NMSA 1978 et seq. For injunction procedure, see Rules 65, 66 N.M.R. Civ. P.

"Inferior courts." — District courts are inferior to supreme court, although term "inferior court" is usually applied to courts of limited or special jurisdiction. *State ex rel. Harvey v. Medier*, 19 N.M. 252, 142 P. 376 (1914).

There are no fixed terms for nonjury trials; however, unless waived by the parties, a case must be tried in the county required by the venue statute. *Peaker v. Chavez*, 46 N.M. 189, 123 P.2d 726 (1942).

Comparable provisions. — Idaho Const., art. V, § 20.

Iowa Const., art. V, §§ 5 (amendment 21), 6.

Montana Const., art. VII, § 4.

Utah Const., art. VIII, § 7.

Wyoming Const., art. V, § 19.

Law reviews. — For article, "Prisoners Are People," see 10 Nat. Resources J. 869 (1970).

For article, "The Writ of Prohibition in New Mexico," see 5 N.M. L. Rev. 91 (1974).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M. L. Rev. 213 (1976).

For comment on *State ex rel. State Corp. Comm'n v. Zinn*, 72 N.M. 29, 380 P.2d 182 (1963), see 3 Nat. Resources J. 356 (1963).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts §§ 44, 87.

Conferring power to abate public nuisances upon chancery courts, validity, 5 A.L.R. 1474; 22 A.L.R. 542; 75 A.L.R. 1298.

Mandamus to governor, 105 A.L.R. 1124.

Power of court to prescribe rules of pleadings, practice or procedure, 110 A.L.R. 22; 158 A.L.R. 705.

Power to confer original jurisdiction on courts to revoke or suspend public license, 164 A.L.R. 826.

21 C.J.S. Courts §§ 238 to 248, 278.

II. ORIGINAL AND APPELLATE JURISDICTION.

Original equity jurisdiction is in district courts and not justice courts (now magistrate courts). *Durham v. Raaco*, 30 N.M. 16, 227 P. 599, 34 A.L.R. 838 (1924).

Reduction of excessive fees. — It is clearly within the equitable power of the court to consider and reduce an excessive fee; thus if the trial court determines that the amount of attorney's fees specified in a contract is reasonable, it may order such amount paid, but when the reasonableness is challenged, it is incumbent upon the court to determine the value of the services rendered. *Budagher v. Sunnyland Enterprises, Inc.*, 90 N.M. 365, 233 P.2d 1188 (1977).

Inherent power to appoint receivers. — Laws 1933, ch. 32 (now repealed) providing that "court to which the application is made shall appoint the state bank examiner as such receiver" amounted to no more in a judicial proceeding in a court of equity, than a recommendation to the judiciary to appoint him in the interests of economy and business management. Otherwise, the enactment would be unconstitutional in view of this section and N.M. Const., art. III, § 1, for courts of equity have inherent power to appoint receivers for corporations, and such appointment is a judicial function. *Cooper v. Otero*, 38 N.M. 164, 29 P.2d 341 (1934).

Jurisdiction in damage suit against utility. — The trial court correctly retained jurisdiction of a case seeking tort and contract damages against utility for failure to supply water meeting certain minimal standards of quality, since the environmental improvement agency (now the environmental improvement division of the health and environment department) and public service commission had no expertise in considering tort and contractual claims and was without power to grant the relief that plaintiffs asked. 74-6-13 NMSA 1978 of the Water Quality Act evidences the legislative intent that common-law remedies against water pollution be preserved. *O'Hare v. Valley Util., Inc.*, 89 N.M. 195, 547 P.2d 1147 (Ct. App. rev'd in part on other grounds, 89 N.M. 262, 550 P.2d 274 (1976)).

Jurisdiction to try title to property. — Probate courts in New Mexico have no jurisdiction to try or determine title to either real or personal property as between an estate or heirs and devisees on the one hand and strangers to the estate on the other, thus jurisdiction is vested exclusively in the district court. In *re Will of Conley*, 58 N.M. 771, 276 P.2d 906 (1954), *McCann v. McCann*, 46 N.M. 406, 129 P.2d 646 (1942).

Where a widow was incidentally an heir but her claim to one-half of the property involved was not the claim of an heir in administration, but was a claim arising under the community property system, the probate court was without jurisdiction to try her controverted claim of title to one-half the real estate involved as her share of the community. In *re Will of Conley*, 58 N.M. 771, 276 P.2d 906 (1954).

Jurisdiction in probate matter. — District courts had no original jurisdiction to allow a claim against an administrator and surety on his bond, where the probate court had jurisdiction and the claim had been filed, allowed and paid in part, and no appeal was taken from the action of such probate court, and where the complaint neither alleged grounds for nor prayed equitable relief, but asked a money judgment only. *Michael v. Bush*, 26 N.M. 612, 195 P. 904 (1921); (case decided prior to 1975 enactment of Probate Code, 45-1-101 to 45-7-401 NMSA 1978).

Authority to issue garnishment. — Since garnishment is both a special proceeding, and a remedial writ, ancillary to the main action, the district courts have jurisdiction to issue writs of garnishment in the exercise of their jurisdiction in the main action only to the extent that jurisdiction over such special proceedings

Loans	Account No.	Amount	Payment
First Interstate Bank PO Box 923 Elmwood NMex 8623	1103065472	\$ 29.70	262. ⁰⁰
Relay 412 E. Bender Blvd. Hobbs NM 88240	45609294 46393972	\$ 1022.75 \$ 152.39	92.98 21.77
Montgomery Wards B.illing PO Box 1606 Fort Worth TX 76101	796-594-241-00	\$ 1710.40	87.5
Sears Billing PO Box 32364 Phoenix, Ariz 85064	062410-617062	\$ 1102.12	36.5
Linda Fischer 106 W. Taylor Hobbs		\$ 2100. ⁰⁰ \$ 8717 <u>42</u>	\$ 477-

Rent 325.⁰⁰
 Utilities \$ 75.⁰⁰
500.⁰⁰
 Payments 499.⁷⁵
999.⁷⁵

~~1287~~ 1287.⁰⁰
 999.⁷⁵
281.25 Pay after taxes and deductions (Wife's Pay)
 Monthly. (20 day work month.)
 To buy food, gas and ect.

Exh. A

Charles H. Fugate

OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED

JUL 13 1984

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1983

ALEXANDER L. STEVAS
CLERK

CHARLES FUGATE

Petitioner

vs.

No. 83-6663

STATE OF NEW MEXICO

Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of New Mexico

RESPONDENT'S BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

Respondent State of New Mexico pursuant to Supreme Court Rule 34.2, does not deem a statement of the case, the issue nor the noted exceptions in the foregoing rule necessary for inclusion in this Brief in Opposition. Petitioner adequately sets out those matters required by Supreme Court Rule 34.1. (Pet., 1-6).

SUMMARY OF ARGUMENT

This case does not merit review in this Court for the following reasons:

1. Few, if any other States expressly follow the "jurisdictional exception" rule in the Double Jeopardy context. This case lacks any impact of national constitutional dimension.
2. The facts of this case are an infrequent occurrence in New Mexico. Limited prosecutorial resources and expressed judicial policy militate against dual level prosecutions as routine practice.
4. The different rules applied to double jeopardy analysis in other federal and state courts do not create a conflict necessary for this Court to resolve in this case.
5. The New Mexico Supreme Court followed the precedent of this Court in correctly deciding the instant case.

ARGUMENT

Petitioner presents this Court with the sole question of whether New Mexico is required to follow federal law on the issue of the "jurisdictional exception" or whether, as the New Mexico Supreme Court has suggested, New Mexico courts must follow its precedent. (Pet. 6). Respondent State of New Mexico respectfully submits this question is not of sufficient importance for review by this Court. Supreme Court Rules, Rule 17.

The facts of this case are of insufficient importance to be resolved by this Court. As noted by the Petitioner, the "jurisdictional exception" doctrine has not been expressly overruled by this Court. As a matter of federal constitutional law, this case is without any impact on this question. Petitioner correctly notes some jurisdictions have rejected the "jurisdictional exception" rule first enunciated in Diaz v. United States, 223 U.S. 442 (1912).

That the New Mexico Supreme Court has followed this exception does not present a federal constitutional issue of significant dimension. Petitioner implicitly suggests New Mexico appears to be the only state which follows this exception to general double jeopardy principles. Since New Mexico may be the only state effected by any ruling this Court may make, there is little point to accept certiorari and decided the matter.

Secondly, the facts of this case are an infrequent occurrence in New Mexico. As routine practice, arresting police officers often times file misdemeanor offenses in courts of limited jurisdictions, the magistrate or municipal courts in New Mexico. The filing of felony charges potentially arising out of the same transaction is left to local prosecutors. If a chargeable felony is cognizable, the misdemeanor charges in the limited courts will generally be dismissed by the prosecutor in

order to proceed upon the felony offenses. This is the routinely preferred practice to avoid the very same circumstances which occur infrequently, as in this case. Thus, not only would the issue presented by Petitioner have limited, if any, impact on federal constitutional law of national import, it would have minimal impact on New Mexico as well.

Additionally, the opinion of the New Mexico Supreme Court under consideration can be construed as encouragement to prosecutors to prosecute misdemeanor and felony offenders twice over. As a factual matter, the case at bar represents a very infrequent occurrence in New Mexico. First, limited prosecutorial resources militate against such dual level prosecutions. All thirteen district attorneys have formal or informal procedures to prevent successive dual-level prosecutions for misdemeanors and felonies arising out of a single criminal transaction. This statement is based upon a telephonic survey conducted by undersigned with each district attorney's office in New Mexico in early May, 1984. This statement was made in Manzanares v. New Mexico, No. 83-6361, Respondent's Brief in Opposition at page 4 on the basis of such survey.

Secondly, the New Mexico Supreme Court has expressly cautioned prosecutors not to engage in dual-level prosecutions as a routine matter. State v. Tijerina, 86 N.M. 31, 519 P.2d 127 (1973) cert. denied, 417 U.S. 956 (1974) admonished prosecutors against what it labelled "piecemeal prosecutions."

It should not be inferred from this opinion that this Court intends to encourage or approve piecemeal prosecution. Such disorderly criminal procedures involve a myriad of problems which threaten the existence of our judicial system. The risk of prejudice to the accused, and the waste of time inherent in multiple trials, both perpetuate delays in the judicial process and unconscionable expenditures of public

funds, all of which could be avoided by prosecutor getting their facts straight, their theories clearly in mind and trying all charges together. Id., 86 N.M. at 36, 519 P.2d at 132.

This view was reiterated in State v. Tanton, 88 N.M. 333, 336, 540 P.2d 813, 816 (1975).

The double jeopardy clause only comes to the aid of defendants subjected to multiple prosecutions for the identical offense, or in such situations in which collateral estoppel, the concept of lesser included offenses or the same evidence test apply. By "piecemeal prosecutions" in Tijerina we referred to multiple prosecutions to which the double jeopardy clause did not apply. Thus, we intended a statement of judicial policy rather than a rule of law. We adhere to the stated policy.

The situation presented here could easily have been avoided by a modicum of cooperation between the respective prosecutors. Moreover, proceedings pending in an inferior court ought to be abated when charges are instituted in district court in relation to the same episode. A defendant in such a situation would have a right to move the inferior court for an abatement to abide the event in district court. Should a defendant in such a case, for whatever reason, fail to so move, he might well have thereby waived any right to complain of piecemeal prosecution. Such procedures would promote judicial economy. The overriding state interest is the efficient prosecution of all crimes and especially felonies. Id., 88 N.M. at 336, 540 P.2d at 816.

Finally, it was urged upon prosecutors a third time in State of New Mexico v. Herald Manzanares, 674 P.2d 511, 514 (1983), presently pending certiorari in this Court. No. 83-6361. Hence, as a matter of precedential value, this case does not merit review by this Court.

Previous precedent of this Court also supports denial of review. The focal point of this Court's decision in Illinois

v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980)

was:

The point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the Blockburger test. The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offenses to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution. Id., 447 U.S. 419, 65 L.Ed.2d 237. (Emphasis added).

Under New Mexico statutory law, vehicle homicide can be committed by one of four different means: driving under the influence of intoxicating liquor (hereafter DWI); driving while under the influence of any drug, reckless driving or simply in the unlawful operation of a motor vehicle. Section 66-8-101, A and C, NMSA 1978. State v. Barela, 95 N.M. 349, 622 P.2d 254 (Ct.App. 1980).

Only one of the aforementioned means is a required and essential element for any given vehicle homicide offense. No single means is required in every vehicular homicide prosecution, so long as any one means is present. Thus, DWI is not a necessarily lesser included offense or essential element of every vehicular homicide. Any one of the other means can also suffice to commit the same offense. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975); State v. Trujillo, 85 N.M. 208, 510 P.2d 1079 (Ct.App. 1973). The offenses here are not the "same" under the Blockburger test relied upon by Vitale, supra, and Missouri v. Hunter, __ U.S. __, 74 L.Ed.2d 535, 542 (1983). See also Thigpen v. Roberts, 52 L.W. 4912 (1984) Rehnquist Dissenting at 4915-16.

Moreover, New Mexico employs the same evidence test for double jeopardy analysis. State v. James, 93 N.M. 607, 603 P.2d

715 (1979); State v. Tanton, supra. To the extent that this test applies in the necessarily included lesser offense context, New Mexico follows the rule that conviction or acquittal of a necessarily included offense in the greater offense bars subsequent prosecution for the greater offense. State v. Tanton, supra; State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct.App. 1977).

The employment of the "same evidence" test distinguishes the case at bar from several of the cases cited by Petitioner from other jurisdictions asserted to be in conflict with the instant case. (See Pet., 10-11). Several of the cited jurisdictions employ the "same transaction" test for double jeopardy analysis. State v. Houser, 626 P.2d 256 (Mont. 1981); Matter of Castello, 293 N.W.2d 839 (Minn. 1980); State v. Anonymous, 329 A.2d 126, 136 (Conn. 1976). The "jurisdictional exception" rule is not followed in State v. Diveley, 458 A.2d 509 (N.J. 1983) and State v. Laguna, 602 P.2d 847 (Ariz.App. 1979).

The courts in People v. Lasek, 405 N.Y.S.2d 911 (N.Y. Co. Ct. 1979) and State ex rel Seal v. Shepard, 299 So.2d 644 (Fla. 1974) applied the necessarily included offense rule to the respective higher offenses at issue. People v. Comingore, 570 P.2d 723 (Ca. 1977) considered whether the defendant's conviction for a similar offense arising out of the same transaction in Oregon barred for the prosecution in the State of California. California apparently followed the same transaction test.

Thus, reliance upon other jurisdictions is of doubtful purpose for granting the writ sought herein. The other state jurisdictions follow different rules of law than New Mexico for jeopardy analysis. This does not raise a substantial federal question. Thus, the asserted conflict between the other states and the State of New Mexico presents no substantial reason for review.

The New Mexico Supreme Court has consistently followed the jurisdictional exception first enunciated by this Court in Diaz v. United States, supra. The New Mexico Supreme Court adopted this exception in State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950) and reaffirmed it as recently as the case now under consideration. (App. 1 at 288-9). The Petition for Writ of Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, the Respondent State of New Mexico submits that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to opposing counsel of record this 10th day of July, 1984.

Anthony Tupler
Assistant Attorney General

STATE OF NEW MEXICO.
Petitioner.

versus

GEORGE PADILLA,
Respondent.

No. 15095 (filed March 1, 1984)

STATE OF NEW MEXICO.
Petitioner.

versus

CHARLES FUGATE,
Respondent.

No. 15127 (filed March 1, 1984)

ORIGINAL PROCEEDINGS ON CERTIORARI

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OPINION

WILLIAM K. FEDERICK, Chief Justice.

These cases have been consolidated since they present the same principal question on appeal. Both of these cases, *State v. Padilla* and *State v. Fugate*, involve the question of whether the "jurisdictional exception," as applied to double jeopardy claims, is still the law in New Mexico. We hold that it is.

Defendant Padilla was involved in an altercation with several police officers which resulted from Padilla's attempt to avoid arrest. While two officers were attempting to handcuff Padilla, he kicked a third officer in the groin. Padilla was charged with felony battery on a police officer as well as several misdemeanors, including resisting arrest. Padilla pled guilty to the misdemeanors in magistrate court. At the district court trial on the felony count Padilla moved to dismiss on grounds of double jeopardy, claiming that resisting arrest and battery on a police officer are the "same offense" for double jeopardy purposes. The trial court denied the motion because it found that the

jurisdictional exception was applicable in this case. Padilla appealed his conviction to the Court of Appeals. The Court of Appeals found that the jurisdictional exception was not the law in New Mexico and reversed the conviction. The State brought the case before this Court on writ of certiorari. We reverse.

Defendant Fugate was involved in a three-vehicle accident which caused great bodily harm, followed by death, to a passenger of one of the other vehicles. Fugate entered a plea of nolo contendere to charges of DWI and careless driving in municipal court. He was found guilty and sentenced to alcohol treatment. Fugate was subsequently tried and convicted of homicide by vehicle in the district court. Fugate appealed his conviction, claiming that the second trial was barred on double jeopardy grounds. The Court of Appeals reversed Fugate's conviction and the State brought the case before this Court on writ of certiorari. We reverse.

We have recently addressed the question of whether the jurisdictional exception, as adopted in *State v.*

Vol 23, No 11, March 15, 1984

Goodson, 54 N.M. 184, 217 P.2d 262 (1950) and *State v. James*, 93 N.M. 605, 605 P.2d 715 (1979), is still applicable in New Mexico in light of the recent United States Supreme Court opinion of *Illinois v. Vitale*, 447 U.S. 410 (1980). We held that there was no compelling reason to overrule *James v. State v. Manzanares*, 23 SEP 9 (1983).

The records in each of the cases before us show that the district courts properly denied motions to dismiss the felony charges on double jeopardy grounds. The Court of Appeals is reversed in each case. The causes are remanded for further proceedings consistent with this opinion and with the holding of *State v. Manzanares*, *id.*

The Court of Appeals opinion on the

From The New Mexico Court of Appeals

STATE OF NEW MEXICO.
Plaintiff-Appellee.

versus

DUANE BRECHEISEN.
Defendant-Appellant.

No. 7365 (filed February 7, 1984)

APPEAL FROM THE DISTRICT COURT OF SIERRA COUNTY
PAUL "PABLO" MARSHALL, Judge

PAUL BARDACKE, Attorney General
ANTHONY TUPLER, Assistant Attorney General
Santa Fe, New Mexico
Attorneys for Plaintiff-Appellee

JANET CLOW, Chief Public Defender
SUSAN GIBBS, Assistant Appellate Defender
Santa Fe, New Mexico
Attorneys for Defendant-Appellant

OPINION

WILLIAM W. BIVINS, Judge.

Defendant appeals from his conviction for criminal sexual penetration (CSP), which resulted in personal injury to the victim, in violation of NMSA 1978, Section 30-9-11(E). The CSP conviction occurred following defendant's second trial on the charge. At the first trial the jury returned a verdict against him for misdemeanor battery and disorderly conduct but could not reach agreement regarding CSP. The trial court declared a mistrial and ordered a new trial on that charge alone. The record of the second trial provides the basis for this appeal.

Defendant raises the following

Court of Appeals Opinions. Judge Bivins second issue in *Padilla*, concerning instructions on simple battery, is proper and correct and the court is affirmed on this issue.

The Court of Appeals opinion in *Fugate* concerning the necessary facts exception is also proper and correct. However, in light of our holding with respect to the jurisdictional exception, it is not necessary to reach the "necessary facts" question in *Fugate*.

IT IS SO ORDERED.

s/WILLIAM R. FEDERICI, Chief Justice

WE CONCUR:

s/DAN SOSA, JR., Senior Justice

s/WILLIAM RIORDAN, Justice

s/HARRY E. STOWERS, Jr., Justice

three issues:

I. Whether defendant's CSP conviction constitutes double jeopardy in violation of his constitutional rights.

II. Whether New Mexico statutes defining criminal sexual penetration are void for vagueness or overbroad and therefore violate defendant's constitutional rights.

III. Whether the State introduced evidence sufficient to support defendant's conviction.

We hold that none of defendant's constitutional rights have been violated and that there is sufficient evidence to support his conviction.

FACTS

On June 11, 1982, following a

JOINT APPENDIX

No. 83-6663

Office - Supreme Court, U.S.
FILED

NOV 5 1984

ALEXANDER L. STEVAS.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES FUGATE, PETITIONER,

v.

STATE OF NEW MEXICO, RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW MEXICO

JOINT APPENDIX

J. THOMAS SULLIVAN
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87501
(505) 827-6000*

Counsel for Repondent

**PETITION FOR CERTIORARI FILED APRIL 30, 1984
CERTIORARI GRANTED OCTOBER 1, 1984**

3728

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<i>Date</i>	<i>Entry</i>
10/14/81	Proceedings filed from Preliminary Hearing
10/29/81	Criminal Information filed
3/11/82	Jury verdict filed: Guilty of Homicide by Vehicle
4/13/82	Judgment, Sentence and Commitment filed: 18 months; suspended except for 6 months in Pen
11/22/82	Memorandum Opinion and Mandate filed from Court of Appeals reversing conviction and remanding for new trial
2/01/83	Motion in Limine; Motion to Dismiss
2/03/83	Instructions to jury filed
2/03/83	Jury verdict filed: Guilty of Homicide by Vehicle
3/09/83	Judgment, Sentence and Commitment filed: 18 months; suspended 6 months of said sentence leaving 12 months to serve in Pen
3/18/83	Docketing statement filed
3/29/83	Calendaring notice filed from Court of Appeals
4/14/83	Calendaring notice filed (Memorandum in Opposition)
9/09/83	Opinion filed from Court of Appeals—Reversed
3/16/84	Original Proceedings on Certiorari filed from Supreme Court
3/28/83	Mandate filed from Court of Appeals
10/01/84	Order granting Writ of Certiorari and Motion for leave to proceed In Forma Pauperis by United States Supreme Court

STATE OF NEW MEXICO

v.

CHARLES K. FUGATE, DEFENDANT

Docket No. 03-01-81-1865A1

Date Filed 9-11-81

CRIMINAL COMPLAINT

DEF. APPEARED WITHOUT COUNSEL
ADVISED OF RIGHTS, CHARGES & PENALTIES
PLEAD GUILTY____ NOT GUILTY____

COUNSEL APPTD.: Joe Gant

TRIAL/HEARING DATE: 10/13/81 COUNTY OF: Eddy,
3 p.m.

CRIME: See below

The undersigned, being duly sworn, upon his oath, complains and says that on or about the 12th day of Aug., 1981, in Eddy County, State of New Mexico, the above-named defendant(s) did:

**COMMIT THE CRIME OF HOMICIDE BY
MOTOR VEHICLE**

See attached complaint incorporated herein
contrary to Section(s) 66-8-101.A&B NMSA 1953.

/s/ Greg Wheeler

GREG WHEELER

Lieutenant Carlsbad Police

Subscribed and sworn to before me in the above named county of the State of New Mexico this 11th day of Sept., 1981.

/s/ W. Thompson

W. THOMPSON

Clerk

MAGISTRATE COURT
EDDY COUNTY,
NEW MEXICO

CRIMINAL DOCKET NO. 81-1865A1

STATE OF NEW MEXICO

v.

CHARLES K. FUGATE
2413 Tulip Road

Carlsbad, New Mexico 88220 (DEFENDANT(S))

CRIMINAL COMPLAINT

Crime: Homicide by Motor Vehicle

STATE OF NEW MEXICO
COUNTY OF EDDY

The undersigned, being duly sworn, upon his oath, complains and says on information and belief that on or about the 12th day of August, 1981, in Eddy County, State of New Mexico, the above-named defendant(s) did:

- (1) COLLIDE IN A THREE CAR COLLISION AT WOOD AND CANAL STREETS INTERSECTION, CARLSBAD, NEW MEXICO, ON 08-12-81 at 1850 HOURS.
- (2) DEFENDANT FUGATE OPERATOR OF A 1979 PONTIAC TRANSAM AUTO, DID PASS THROUGH A STOP SIGN CONTROLLED INTERSECTON.
- (3) DEFENDANT DID COLLIDE WITH FIRST A TRUCK DRIVING NORTHBOUND OPERATED BY A BILLY W. CARLILE.
- (4) DEFENDANT SUBSEQUENTLY COLLIDED BROADSIDE WITH A SOUTHBOUND PICKUP OPERATED BY OBIE UPTON OF 204 L. STREET, CARLSBAD, NEW MEXICO.

- (5) THE UPTON PICKUP WENT AIRBORNE AND LANDED ON THE LEFT SIDE UPON THE PROPERTY OF ROYAL MANOR MOTEL, 2001 SOUTH CANAL.
- (6) A PASSENGER, LILLIE MAE UPTON, 62 YEARS OF AGE, OF 204 L. STREET, CARLSBAD, NEW MEXICO, DID SUFFER GREAT BODILY INJURY.
- (7) DEFENDANT FUGATE WAS PLACED UNDER ARREST FOR OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR, CONTRARY TO 66-8-101.B N.M.S.A. 1978 ANOTATED.
- (8) PASSENGER, LILLIE MAE UPTON, DID EXPIRE AS A RESULT OF INJURIES RECEIVED AT 1235 HOURS ON 09-05-81.
- (9) DEFENDANT DID COMMIT HOMICIDE BY MOTOR VEHICLE WHILE DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR; CAUSING GREAT BODILY INJURY TO LILLIE MAE UPTON, A HUMAN BEING WHOSE INJURIES RESULTED IN HER DEATH.

Contrary to Section(s) 66-8-101.A&B N.M.S.A., 1953 compilation.

Approved:

JAMES W. KLIPSTINE, ADA

/s/ Greg Wheeler

GREG WHEELER

Complainant

Lieutenant, Carlsbad Police

Subscribed and sworn to before me this 11th day of Sept., 1981.

/s/ W. Thompson

W. THOMPSON

Clerk

DISTRICT COURT
5TH JUDICIAL DISTRICT OF NEW MEXICO
EDDY COUNTY

No. CR-81-224

STATE OF NEW MEXICO, PLAINTIFF,

v.

CHARLES K. FUGATE, DEFENDANT.

CRIME: Homicide by Vehicle

CRIMINAL INFORMATION—Filed Oct. 29, 1981

The Assistant District Attorney of Eddy County, State of New Mexico, states that on or between the 12th day of August, 1981, in said County and State, the above-named defendant did:

Commit the crime of HOMICIDE BY VEHICLE, and alleges that the defendant did kill Lillie Mae Upton, a human being, while being in the unlawful operation of a motor vehicle, and that this did happen in Eddy County, New Mexico;

and/or

Commit the crime of HOMICIDE BY VEHICLE, and alleges that the defendant did injure Lillie Mae Upton, a human being, said injury resulting in permanent or protracted loss or impairment of the function of her members and organs of her body.

contrary to Section 66-8-101, NMSA, 1978.

The name of the witnesses upon whose testimony this information is based are as follows:

Billy W. Carlile
Obie Upton
J. Roger Ridgway
Dwayne Mounce
Steven Mehsch

Greg Wheeler
Dr. H. V. Beighley
Dr. A. H. Gutierrez
Dr. William Baggs

Penalty: 4th Degree Felony.

/s/ Lesley S. Williams

LESLEY S. WILLIAMS

Assistant District Attorney

Certificate of Service (omitted in printing)

7

DISTRICT COURT
5TH JUDICIAL DISTRICT OF NEW MEXICO
EDDY COUNTY

No. CR-81-224

STATE OF NEW MEXICO, PLAINTIFF,

v.

CHARLES FUGATE, DEFENDANT.

MOTION IN LIMINAE:

MOTION TO DISMISS—Filed Feb. 1, 1983

COMES NOW the Defendant, Charles Fugate, by and through his attorney, Linda Fischer, and respectfully requests the Court to dismiss the charge of vehicular homicide now pending against the Defendant. As grounds therefor defense counsel states:

1. That on August 13, 1981, the Defendant pleaded no contest to charges of DWI and careless driving in violation of Carlsbad Municipal Ordinances. The Defendant was found guilty and sentenced as a result of his pleas.
2. That on March 10, 1982, the Defendant was tried in the District Court of Eddy County for vehicular homicide and was found guilty by a jury verdict.
3. That on October 20, 1982, the New Mexico Court of Appeals reversed the Defendant's conviction and remanded the case back to the Eddy County District Court.
4. The Defendant is rescheduled for a new trial but this new trial, as well as the previous one, violates the Defendant's constitutional guarantee that he be kept free from being twice placed in jeopardy for the same offense.
5. In *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), the Supreme Court reiterated their position concerning the sequence of convictions and the double jeopardy claim. The Court held that:

"Although in this formulation the conviction of the greater precedes the conviction of the lesser, the opinion makes it clear that the sequence is immaterial."

6. In *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed. 20435 (1970), the Supreme Court found that double jeopardy had attached even though the charges involved the jurisdiction of two different courts within the state. *Waller* established that the argument for dual sovereignty was an anachronism.

In *Waller*, the Supreme Court prohibited the retrial of a Defendant convicted first of destruction of city property and breach of peace in a city Court, and convicted later of grand larceny.

7. The criminal information in Eddy County Criminal Case No. CR-81-224, fails to notify the Defendant as to which type of vehicular homicide he is being charged: Vehicular homicide due to DWI or vehicular homicide due to reckless driving.

8. In *St. v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975) Judge Sosa held that DWI is a lesser included offense of vehicular homicide.

9. In Section 66-8-113, N.M.S.A. (1978) careless driving is an included offense of reckless driving.

10. The United States Supreme Court has held that a conviction or an acquittal of a lesser offense bars the prosecution of a greater offense. *Brown v. Ohio*.

WHEREFORE, Defendant prays that his pleas to DWI and careless driving bar the prosecution from proceeding against him on a charge of vehicular homicide because of the double jeopardy guarantee.

/s/ Linda Fischer

LINDA FISCHER

106 W. Taylor

Hobbs, New Mexico 88240

(505) 397-4985

Attorney for Defendant

Certificate of Service (omitted in printing)

DISTRICT COURT
5TH JUDICIAL DISTRICT OF NEW MEXICO
EDDY COUNTY

STATE OF NEW MEXICO

v.

CHARLES FUGATE

EXCERPTS FROM TRIAL COURT'S
CHARGE TO THE JURY

[165] 3 For you to find the defendant guilty of causing death or great bodily harm by vehicle, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle while under the influence of intoxicating liquor or recklessly;

2. The defendant thereby caused the death or great bodily harm of Lillie Mae Upton;

3. This happened in New Mexico on or about the 12th day of August, 1981.

[166] 4 Great bodily harm means an injury to a person which results in permanent or prolonged impairment of the use of any member or organ of the body.

[167] 5 In addition to the other elements of causing death or great bodily harm by vehicle, the State must prove to your satisfaction beyond a reasonable doubt that the defendant acted intentionally when he committed the crime. A person acts intentionally when he purposely does an act which the law declares to be a crime, even though he may not know that his act is unlawful. Whether the defendant acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used, his conduct and any statements made by him.

[168] 6 For you to find the defendant guilty of Homicide by Vehicle, the State must prove to your satisfaction beyond a reasonable doubt that the act of the defendant caused the death of Lillie Mae Upton.

The cause of a death is an act which, in a natural and continuous chain of events, produces the death and without which the death would not have occurred.

[169] 7 For you to find that the defendant was driving recklessly, you must find that he drove with a total disregard or indifference for the safety of others.

[170] 8 A person in under the influence of intoxicating liquor when as a result of drinking such liquor he is less able, to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to himself and the public.

[171] 9 Test results showing the percentage of weight of alcohol in the blood of the defendant at the time that the test was given have been introduced into evidence. With other evidence, these test results may be considered for the purpose of determining whether or not the defendant was under the influence of intoxicating liquor at the time of the incident.

If you find that the defendant's blood at the time of the incident contained one-tenth of one percent (.1%) or more by weight of alcohol, you may but are not required to find that he was under the influence of intoxicating liquor. However, you may do so only if on considering all the evidence, you are convinced beyond a reasonable doubt that the defendant was intoxicated at the time of the incident.

DISTRICT COURT
5TH JUDICIAL DISTRICT OF NEW MEXICO
EDDY COUNTY

No. CR-81-224

STATE OF NEW MEXICO, PLAINTIFF,

v.

CHARLES K. FUGATE, DEFENDANT.

We find the defendant Charles K. Fugate GUILTY of
HOMICIDE BY VEHICLE.

/s/ William R. Haun
WILLIAM R. HAUN
Foreman

Filed FEBRUARY 3, 1983

DISTRICT COURT
5TH JUDICIAL DISTRICT OF NEW MEXICO
EDDY COUNTY

No. CR-81-224

STATE OF NEW MEXICO, PLAINTIFF

v.

CHARLES K. FUGATE, DEFENDANT

JUDGMENT, SENTENCE AND COMMITMENT—
Filed Mar. 9, 1983

THIS MATTER coming on for hearing on March 7, 1983, before THE HONORABLE HARVEY W. FORT, District Judge, Plaintiff appearing by LESLEY WILLIAMS, Assistant District Attorney, and Defendant appearing personally and by his attorney, LINDA FISCHER, the Defendant having been convicted on February 2, 1983, pursuant to a guilty verdict of a twelve person jury, of the following crime: HOMICIDE BY VEHICLE.

Defendant is hereby found and adjudged guilty and convicted of said crime and is sentenced to be imprisoned in the Corrections Division of the Criminal Justice Department of the State of New Mexico for a term of EIGHTEEN (18) MONTHS, followed by ONE (1) year of statutory parole. SIX (6) MONTHS of said sentence is suspended and defendant is TO SERVE TWELVE (12) MONTHS in the Corrections Division of the Criminal Justice Department of the State of New Mexico, followed by ONE (1) YEAR of statutory parole.

THEREFORE, You the Sheriff of Eddy County, New Mexico, are hereby commanded to take the above named Defendant in custody and deliver him together with this commitment to the Corrections Division of the Criminal Justice Department of the State of New Mexico which is hereby commanded to receive him and confine him for the above term.

Defendant shall receive credit for 2 days presentence confinement and post-sentence confinement from March 7, 1983.

/s/ Harvey W. Fort
HARVEY W. FORT,
District Judge

cc: ADA
Fischer
Fugate
S.O.
Adult Probation
Corrections Dept.

NEW MEXICO COURT OF APPEALS

C.A. No.
D.C. No. CR-81-224

STATE OF NEW MEXICO, PLAINTIFF-APPELLEE,

v.

CHARLES FUGATE, DEFENDANT-APPELLANT.

APPEAL FROM THE DISTRICT COURT
OF EDDY COUNTY

The Honorable HARVEY W. FORT, *Judge*

DOCKETING STATEMENT—Filed Mar. 18, 1983

LINDA FISCHER,
Attorney for Defendant-Appellant
106 West Taylor
Hobbs, New Mexico 88240

LES WILLIAMS
Attorney for Plaintiff-Appellee
Assistant District Attorney
P.O. Box 1448
Carlsbad, New Mexico 88220

PAUL BARDAKE
Attorney General
P.O. Box 1508
Santa Fe, New Mexico 87501

DOCKETING STATEMENT

I. Nature of Proceedings

This is a direct appeal from the Defendant's conviction of homicide by vehicle, contrary to Section 66-8-101, N.M.S.A. (1978). The conviction came as a result of a jury

verdict in the District Court of Eddy County, Cause No. CR-81-224, the Honorable Harvey W. Fort, District Court Judge, presiding.

II. Jurisdiction

Judgment and sentence was entered on March 7, 1983. The Court imposed a sentence of eighteen months imprisonment in the State Penitentiary, followed by one year of statutory parole. Six months of said sentence was suspended and the Defendant is to serve twelve months in the State Penitentiary followed by one year of statutory parole.

An appeal bond was set at \$100,000.00. Notice of appeal was timely filed on March 11, 1982.

III. Statement of Facts

The Defendant was arrested on August 12, 1981, for driving while under the influence of alcohol and careless driving in violation of Carlsbad, New Mexico Municipal Ordinances. The Defendant was arrested on these charges as a result of his involvement in a car accident.

The accident involved three vehicles. The evidence at trial indicated that the Defendant failed to stop at a stop sign and proceeded across two lanes of traffic striking two cars as he traveled. There was only one seriously injured individual at the scene: Lillie Mae Upton.

Mrs. Upton was removed from the scene by ambulance and taken to the Guadalupe Medical Center in Carlsbad, New Mexico. Upon arrival at the hospital, Mrs. Upton was examined by Dr. William J. Baggs, an orthopedic surgeon. His diagnosis at that time was that Mrs. Upton had incurred a "markedly displaced left humerus fracture". The doctor would later testify that this fracture constituted great bodily harm under the law.

On August 13, 1981, the Defendant appeared before Municipal Court Judge J. Lee Cathy. The Defendant entered pleas of nolo contendere to charges of driving while under the influence of alcohol and careless driving. The Defendant was found guilty and sentenced to the Alcohol Care Unit in Hobbs, New Mexico, for a 21 day treatment program to be followed by weekly sessions with the South Eddy County Council on Alcoholism for a period of 180 days.

Following the successful completion of his Care Unit treatment and the partial completion of his time with the Council on Alcoholism, the Municipal Court charges against the Defendant were dismissed.

On September 5, 1981, Mrs. Upton died. Following her death, the Defendant was charged with homicide by vehicle. The Criminal Information read as follows:

"The Assistant District Attorney of Eddy County, State of New Mexico, states that on or between the 12th of August, 1981, and September 5, 1981, in said County and State, the above-named Defendant did commit the crime of HOMICIDE BY VEHICLE, and alleges that the Defendant did kill Lillie Mae Upton, a human being, while being in the unlawful operation of a motor vehicle, and that this did happen in Eddy County, New Mexico;

and/or

Commit the crime in HOMICIDE BY VEHICLE, and alleges that the Defendant did injure Lillie Mae Upton, a human being, said injury resulting in permanent or protracted loss of impairment of the function of her members and organs of her body contrary to Section 66-8-101, N.M.S.A. (1978)".

On March 11, 1982, the Defendant was convicted by a jury of homicide by vehicle. The Defendant successfully appealed this conviction in Court of Appeals Case No. 5722.

On February 2, 1983, the Defendant was retried by the State of New Mexico. A motion in liminae was filed by the defense prior to trial. This motion was heard by the Court after the trial had commenced and was denied. The Defendant contended that the two trials in District Court violated the Defendant's constitutional guarantee against double jeopardy.

The State also presented a motion to the court in an attempt to keep out of evidence the prior speeding convictions of Obie Upton, a driver of one of the vehicles in the three car accident. The Defendant argued that the two prior speeding convictions and the warning of license revocation constituted evidence of a habit in accordance with Rule 406 of the New Mexico Rules of Evidence. The Court

ruled that the evidence was irrelevant and ordered that the speeding convictions be kept out of evidence.

Both the State and the Defendant made opening statements at the outset of the trial. The State then called J. Roger Ridgeway as its first witness.

Mr. Ridgeway was on the scene at the time of the accident. He was in his vehicle, waiting to make a turn into traffic. He testified that he saw a car that he believed was traveling beyond the speed limit, run across two lanes of traffic and strike a pickup. It was Mr. Ridgeway's opinion that the car failed to stop at a posted stop sign. This witness was unable to identify the Defendant as the individual driving that car.

The State then called Billy W. Carlile to testify. Mr. Carlile testified that he was traveling in one of the lanes of traffic across which the Defendant had proceeded. Mr. Carlile said he knew the Defendant was not going to stop. Mr. Carlile couldn't stop in time to avoid hitting the Defendant's vehicle and as a result, Carlile's truck hit the rear of the Defendant's Trans Am.

Mr. Obie Upton was then called as a State's witness. Mr. Upton was driving his pickup when he was hit by Defendant's vehicle. Mr. Upton stated that the passengers in his truck included his wife and grandchild. As a result of the accident Mrs. Upton was taken to the Guadalupe Medical Center for treatment.

The State then called Officer Dwayne Mounce to testify. Officer Mounce was one of the first officials to arrive at the scene. He said it was raining at the time he arrived at the scene and had been raining throughout the day. This officer helped organize traffic while waiting for back up personnel.

Officer Steven Mensch testified next. Officer Mensch prepared the diagram depicting the events at the scene. Mensch admitted that he was able to make the diagram from his own observations as well as of those present at the scene. Mensch also stated that there may have been some skidding during the course of the accident but that his chart did not reflect any skid markings.

Officer Greg Wheeler was then called as a witness. Mr. Wheeler supervised the rescue and control activities at the

scene. Mr. Wheeler said he found a drinking glass on the floorboard of the Defendant's vehicle. He also smelled liquor emanating from the car of the Defendant.

Officer Wheeler met with the Defendant at the police station following the Defendant's visit to the Guadalupe Medical Center for medical treatment. Officer Wheeler conducted the intoximeter test on the Defendant.

Jeffrey Robb from the Scientific Laboratory in Albuquerque testified next. Mr. Robb is a chemist. He testified as to the proper working condition of the Carlsbad intoximeter machine on the day that the Defendant was tested for the amount of alcohol in his system.

The Court then recessed for the day. The following day, the trial resumed with Dr. William Baggs, a witness for the State. Dr. Baggs is an orthopedic surgeon in Carlsbad, New Mexico. He first met with Mrs. Upton, the deceased, on the day of the accident at the hospital emergency room. Mrs. Upton was in the hospital for one week after the accident. She was released and readmitted on August 31, 1981. It was Dr. Baggs opinion that the deceased's arm injury satisfied the legal definition of great bodily harm. The doctor was permitted to give this opinion over defense counsel's objection.

Dr. M.K. Miner then testified for the State. He had never met the deceased, but was present with several others at the time of her death.

Dr. H.V. Beighley was then called as a witness. Dr. Beighley is a pathologist. He performed an autopsy on Mrs. Upton. He stated that the deceased died as a result of an embolism becoming lodged in her pulmonary artery. He concluded that the embolism occurred as a result of bedrest following the accident.

The State then recalled Officer Greg Wheeler. Mr. Wheeler was questioned concerning whether or not he properly administered the intoximeter test on the Defendant.

The State then rested.

The Defendant then made a motion for a directed verdict which was denied. The defense then rested.

IV. Issue Presented By this Appeal

Whether a conviction of driving while under the influence of alcohol and careless driving in Municipal Court constitutes double jeopardy and prohibits a trial in District Court of homicide by vehicle.

V. Authorities

State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975). The concept of lesser included offenses is a double jeopardy consideration. This principal is inappropriate only when the Defendant is charged in the alternative.

State v. Orosco, *The State Bar of New Mexico's News & Views* (ISSN 029-375X), Vol. 22, No. 4 January 27, 1983. *State v. James*, 93 N.M. 605, 603 P.2d 715 (1979), may not be in conformity with *Brown v. Ohio*.

Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). The sequence of convictions is immaterial to the issue of double jeopardy.

Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed. 435 (1970). The argument for dual sovereignty is an anachronism.

Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed. 2d and 9. Municipal Court and State Courts may not be treated as separate sovereignties for double jeopardy purposes.

VI. Record of Proceedings

The entire proceedings were recorded on tape by Lloyd Clem, Court Reporter.

VII. Necessary Exhibits

Municipal Court tickets.

Municipal Court Judgment and Sentence.

Respectfully submitted,

/s/ Linda Fischer

LINDA FISCHER

Attorney for Defendant-Appellant

Certificate of service (omitted in printing)

NEW MEXICO COURT OF APPEALS

Docket No. 7113

STATE OF NEW MEXICO, PLAINTIFF-APPELLEE,

v.

CHARLES FUGATE, DEFENDANT-APPELLANT

CALENDARING NOTICE—Filed March 29, 1983

Appeal From: Eddy County No. CR-18-224

Judge: Harvey W. Fort

Attorneys for Plaintiff: Attorney General, District Attorney

Attorneys for Defendant: Linda Fischer

You are hereby notified that:

☒ Record Proper

was filed in the above-entitled cause on March 22, 1983. This case has been assigned to the SUMMARY CALENDAR. Summary reversal is proposed.

State v. James, 93 N.M. 605, 603 P.2d 715 (1979), is not applicable to this case for two reasons. First, the circumstances of the *James* case did not rise to the level of a conviction for purposes of double jeopardy. Here, the docketing statement states that defendant entered a nolo plea and was convicted. *James*, therefore, does not apply to this case. See *State v. Powell*, No. 5843 (N.M. Ct.App., Jan. 6, 1983) [22 N.M.S.B.B. 185]; *State v. Foreman*, 97 N.M. 583, 642 P.2d 186 (Ct.App. 1982).

Second, to the extent that *James* relied on *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970), for the proposition that double jeopardy is not violated in this situation, *James* did not consider more recent U.S. Supreme Court authority which makes it unmistakably clear that a conviction in municipal court for a lesser included offense bars later prosecution in district

court for the greater offense. *E.g.*, *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *Robinson v. Neil*, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973). *James*, therefore, does not apply to this case. See *State v. Dominguez*, 97 N.M. 592, 642 P.2d 195 (Ct.App. 1982), cert. quashed, Mar. 18, 1982. Here, defendant was convicted of DWI and careless driving. The information (R.1) and instructions to the jury (R. 165) allowed conviction of the greater offense on either theory, thus presenting a lesser included offense problem on either theory. Compare *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975).

Moreover, defendant did not waive the issue by not filing his motion until before the second trial. Section 30-1-10, N.M.S.A. 1978.

/s/ Thomas A. Donnelly
THOMAS A. DONNELLY
Judge

MARCH 28, 1983

cc: Judge Fort
Lloyd Clem

NEW MEXICO COURT OF APPEALS

 No. 7113

STATE OF NEW MEXICO

v.

CHARLES FUGATE

CALENDARING NOTICE

You are hereby notified that:

☐ Record Proper☒ Memorandum in Opposition

was filed in the above-entitled cause on April 7, 1983. This case has been reassigned to the LEGAL CALENDAR. No oral argument.

/s/ Thomas A. Donnelly

 THOMAS A. DONNELLY
 Judge

APRIL 11, 1983

NEW MEXICO COURT OF APPEALS

 CR-81-224

No. 7113

STATE OF NEW MEXICO, PLAINTIFF-APPELLEE,

v.

CHARLES FUGATE, DEFENDANT-APPELLANT.

 APPEAL FROM THE DISTRICT COURT OF
 EDDY COUNTY

FORT, Judge

PAUL BARDACKE, *Attorney General*ANTHONY TUPLER, *Assistant Attorney General**Sante Fe, New Mexico**Attorneys for Plaintiff-Appellee*

LINDA FISHER

*Hobbs, New Mexico**Attorney for Defendant-Appellant*

OPINION—Filed Sept. 1, 1983

WALTERS, *Chief Judge*.

Defendant was charged with homicide by vehicle. His first trial resulted in a conviction, and it was overturned by this court on appeal. Upon remand for a second trial, he was again found guilty. On this appeal, we initially calendared the case for summary reversal. The State filed a memorandum in opposition to the proposed calendaring, and we reassigned the matter to the legal calendar. Defendant's statement of the issue presented is:

Whether double jeopardy precludes a prosecution for Homicide by Vehicle concerning an incident where the defendant has previously been convicted of Driving While Intoxicated and Careless Driving.

The question arises because defendant was convicted in Carlsbad Municipal Court, on pleas of nolo contendere, of careless driving and driving while under the influence of al-

cohol (DWI), in violation of municipal ordinances. The charges followed a three-car collision on August 12, 1981; the municipal court convictions were had on August 13th. On September 5, 1981, one of the persons injured in the accident died. On September 11, 1981, defendant was charged by criminal information in district court with vehicular homicide, the charge being made alternatively in the language of the statute, NMSA 1978, § 66-8-101 (Cum.Supp.1982), and the NMSA 1978, UMI Crim. 2.60 (Repl.Pamp.1982), to assert death or great bodily injury resulting from defendant's unlawful operation of a motor vehicle. Defendant filed a motion to dismiss on grounds of double jeopardy on February 1st; the jury was selected on February 2nd and a verdict returned on February 3rd. Although the record does not reflect a ruling by the court on defendant's motion, it is apparent from the course of proceedings that it was denied.

In our initial calendaring of this case, we relied on the statements of the docketing statement (which, if not challenged, are taken as true) to infer that the municipal and state offenses of careless and reckless driving were the same for double jeopardy purposes. In its memorandum in opposition, the State accepted that inference, and asserted only that the exceptions of *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912), i.e., jurisdictional and lack of necessary facts, removed this case from a double jeopardy consideration.

We have recently twice discussed, in *State v. Padilla*, No. 7032 (Ct.App.1983), and *State v. Manzanares*, No. 7107 (Ct.App.1983), the unmistakable rejection by the United States Supreme Court of the *Diaz* "jurisdictional exception." We agree with defendant that a jurisdictional exception does not exist.

Under NMSA 1978, § 66-8-101(C), vehicular homicide can be committed only by reckless driving or DWI. The State has, in effect, conceded that reckless and careless driving are identical offenses. We do not, therefore, consider whether careless driving is a necessarily included lesser offense of reckless driving. See *State v. Pohl*, 89 N.M. 523, 554 P.2d 984 (Ct.App.1976). We address, in-

stead, the State's only argument—that the *Diaz* "necessary facts" exception supports the district court conviction. It contends that although defendant could have been charged with great bodily injury under § 66-8-101 at the time he was charged with careless driving and DWI in municipal court, he could not have been charged at that time for causing death by vehicle under the same statute because the death had not yet occurred.

There is irrefutable logic in the State's position insofar as the death did not occur until after the municipal court convictions. But it does not alter the more significant fact that a single statute, § 66-8-101, condemns both death-by-vehicle and great-bodily-injury-by-vehicle, and imposes the same penalty for either violation. It is equally undisputed that either offense under § 66-8-101 can only be committed by reckless driving or by DWI. Defendant was once convicted in municipal court of DWI arising out of the identical incident upon which defendant was later charged in district court; he cannot be tried again of a charge requiring proof of the identical conduct upon which he already has been convicted. *State v. Padilla*. The same rationale applies to the conviction for careless driving because the State has, by acquiescence, agreed that conviction of that offense in municipal court was tantamount to a conviction for reckless driving.

Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), was concerned with a claim of double jeopardy for a later prosecution on auto theft following conviction of joyriding. But at footnote 7 in *Brown*, it was suggested that the "necessary facts" exception of *Diaz* might exist "where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite due diligence." If the exception really applies to a "more serious charge," as *Brown* would indicate, rather than only to a charge which embraces a "lesser included offense," we have no difficulty in holding that the *Diaz* exception is not a factor in this case. Death-by-vehicle is not a "more serious charge" than great-bodily-injury-by-vehicle.

Applying the language of *Brown* literally, we conclude that defendant could have been charged with and convicted in district court of inflicting great-bodily-injury-by-vehicle under § 66-8-101 at the time he was charged in municipal court. If convicted, he would have been subject to the same penalty as would have applied had he not been tried in municipal court and had charges ultimately been brought instead for death-by-vehicle under that statute. The State had nothing to lose by filing "great-bodily-injury" charges in district court at the time of the accident upon the facts then known. Under those circumstances, no reliance on the "necessary facts" exception of *Diaz*, upon which rests excuse from filing the death-by-vehicle charges at the time, would have been required. Sufficient facts already were known to permit the filing of the alternative offense of great-bodily-injury-by-vehicle under the same statute; that charge would have borne the same felony conviction and the same felony penalty as would conviction of the alternative statutory offense of death-by-vehicle. Section 66-8-101 makes clear that the legislative concern is the infliction of harm as a result of defendant's unlawful conduct; and whether the harm done results in great bodily injury or in death, it is the defendant's conduct, not the result, that incurs equal punishment for either kind of harm.

Stated otherwise, death-by-vehicle is not a "greater charge" nor a "more serious charge" than great-bodily-injury-by-vehicle. Consequently, once defendant was convicted by the municipal court offenses underlying either of the district court alternative charges under § 66-8-101, there was no absence of "necessary facts" which would have preserved the charge of death-by-vehicle from the prohibition of double jeopardy.

The conviction and sentence are reversed and defendant is ordered discharged.

IT IS SO ORDERED.

/s/ Mary C. Walters, C.J.
MARY C. WALTERS
C.J.

WE CONCUR:

/s/ William R. Hendley, J.
WILLIAM R. HENDLEY
/s/ C. Fincher Neal, J.
C. FINCHER NEAL

NEW MEXICO SUPREME COURT

No. 15,098

STATE OF NEW MEXICO, PETITIONER,

v.

GEORGE PADILLA, RESPONDENT.

No. 15,127

STATE OF NEW MEXICO, PETITIONER

v.

CHARLES FUGATE, RESPONDENT.

ORIGINAL PROCEEDING ON CERTIORARI

PAUL BARDACKE, *Attorney General*
 ANTHONY TUPLER, *Assist. Atty. Gen.*
Santa Fe, NM
For Petitioner

JANET CLOW, *Chief Public Defender*
 HENRY R. QUINTERO, *Assist. App. Defender*
Santa Fe, NM
For Respondent Padilla

LINDA FISCHER
Hobbs, NM
For Respondent Fugate

OPINION—Filed Mar. 1, 1984

FEDERICI, *Chief Justice.*

These cases have been consolidated since they present the same principal question on appeal. Both of these cases, *State v. Padilla* and *State v. Fugate*, involve the question of whether the "jurisdictional exception," as applied to double jeopardy claims, is still the law of New Mexico. We hold that it is.

Defendant Padilla was involved in an altercation with several police officers which resulted from Padilla's attempt to avoid arrest. While two officers were attempting to handcuff Padilla, he kicked a third officer in the groin. Padilla was charged with felony battery on a police officer as well as several misdemeanors, including resisting arrest. Padilla pled guilty to the misdemeanors in magistrate court. At the district court trial on the felony count Padilla moved to dismiss on grounds of double jeopardy, claiming that resisting arrest and battery on a police officer are the "same offense" for double jeopardy purposes. The trial court denied the motion because it found that the jurisdictional exception was applicable in this case. Padilla appealed his conviction to the Court of Appeals. The Court of Appeals found that the jurisdictional exception was not the law in New Mexico and reversed the conviction. The State brought the case before this Court on writ of certiorari. We reverse.

Defendant Fugate was involved in a three-vehicle accident which caused great bodily harm, followed by death, to a passenger of one of the other vehicles. Fugate entered a plea of nolo contendere to charges of DWI and careless driving in municipal court. He was found guilty and sentenced to alcohol treatment. Fugate was subsequently tried and convicted of homicide by vehicle in the district court. Fugate appealed his conviction, claiming that the second trial was barred on double jeopardy grounds. The Court of Appeals reversed Fugate's conviction and the State brought the case before this Court on writ of certiorari. We reverse.

We have recently addressed the question of whether the jurisdictional exception, as adopted in *State v. Goodson*, 54 N.M. 184, 217 P.2d 262 (1950) and *State v. James*, 93 N.M. 605, 603 P.2d 715 (1979), is still applicable in New Mexico in light of the recent United States Supreme Court opinion of *Illinois v. Vitale*, 447 U.S. 410 (1980). We held that there was no compelling reason to overrule *James*. *State v. Manzanares*, 23 SBB 9 (1983).

The records in each of the cases before us show that the district courts properly denied motions to dismiss the fel-

ony charges on double jeopardy grounds. The Court of Appeals is reversed in each case. The causes are remanded for further proceedings consistent with this opinion and with the holding of *State v. Manzanares, Id.*

The Court of Appeals opinion on the second issue in *Padilla*, concerning instructions on simple battery, is proper and correct and the court is affirmed on this issue.

The Court of Appeals opinion in *Fugate* concerning the necessary facts exception is also proper and correct. However, in light of our holding with respect to the jurisdictional exception, it is not necessary to reach the "necessary facts" question in *Fugate*.

IT IS SO ORDERED.

/s/ William R. Federici
WILLIAM R. FEDERICI
Chief Justice

WE CONCUR:

/s/ Dan Sosa, Jr.
DAN SOSA, JR.
Senior Justice

/s/ William Riordan
WILLIAM RIORDAN
Justice

/s/ Harry E. Stowers, Jr.
HARRY E. STOWERS, JR.
Justice

IN THE COURT OF APPEALS OF THE STATE OF
NEW MEXICO

MARCH 23, 1984

No. 7113

STATE OF NEW MEXICO, PLAINTIFF-APPELLEE

v.

CHARLES FUGATE, DEFENDANT-APPELLANT.

In this cause, the Supreme Court, on March 16, 1984, having issued a final order remanding the above cause to the Court of Appeals for further proceedings consistent with its opinion in No. 15,127, and its holding in *State v. Mazanares*, and it appearing that all issues raised by appellant have been disposed of,

IT IS ORDERED that the Clerk of this Court shall, forthwith, issue the mandate in the above cause.

/s/ Thomas A. Donnelly
THOMAS A. DONNELLY
Judge

ATTEST: A true copy

/s/ Susan W. Bagwell
SUSAN W. BAGWELL
Clerk

IN THE COURT OF APPEALS OF THE STATE OF
NEW MEXICO

No. 7113
No. CR-81-224

STATE OF NEW MEXICO

v.

CHARLES FUGATE

EDDY County

MANDATE TO DISTRICT COURT CLERK

(Applicable items are indicated by an "X" below.)

1. X Attached is a true and correct copy of the original decision entered in the above-entitled cause.
2. X This decision being now final, the cause is remanded to you for any further proceedings consistent with said decision.
3. X Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision now being final, this cause is remanded to you for any further proceedings consistent with said Supreme Court decision attached hereto.
4. X You are directed to issue any commitment necessary for the execution of your judgment and sentence.
5. District Court Clerk's Record returned herewith.
6. Exhibits filed herein shall be picked up at this Clerk's Office forthwith.
7. Cost Bill is assessed as follows:
By direction of and in the name of the Chief Judge of the Court of Appeals, this 23rd day of March, 1984.

/s/ Susan L. Bogmen
SUSAN L. BOGMEN
Clerk of the Court of Appeals
of the State of New Mexico

(SEAL)

cc: Judge Fort
Counsel

Supreme Court of the United States

No. 83-6663

CHARLES FUGATE, PETITIONER,

v.

NEW MEXICO

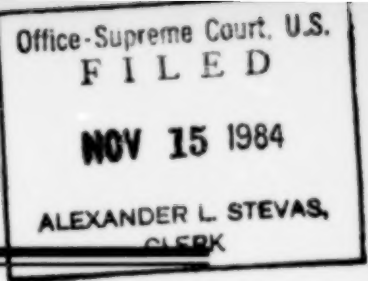
ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of New Mexico.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 1, 1984

PETITIONER'S BRIEF

No. 83-6663



IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES FUGATE,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW MEXICO**

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the Double Jeopardy Clause requires reversal of Petitioner's felony conviction for vehicular homicide obtained following his conviction in municipal court for lesser included offenses of the felony?

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OPINIONS BELOW

The opinion of the New Mexico Supreme Court in the companion cases, *State v. Padilla* and *State v. Fugate*, is published at 101 N.M. 58, 678 P.2d 686 (1984). The opinion of the New Mexico Court of Appeals in *Fugate* is published at 101 N.M. 82, 678 P.2d 710 (Ct. App. 1983). The Court of Appeals opinion in the related case, *State v. Padilla*, is published at 101 N.M. 78, 678 P.2d 706 (Ct. App. 1983). Additionally, the New Mexico Supreme Court relied heavily on its opinion in *State v. Manzanares*, 100 N.M. 621, 674 P.2d 510 (1983) in reversing the intermediate court in *Padilla* and *Fugate*.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The judgment reviewed was rendered by the New Mexico Supreme Court on March 1, 1984. Petitioner's petition for writ of certiorari was docketed in this Court on April 30, 1984. The writ was issued on October 1, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner relies upon the Fifth and Fourteenth Amendments in support of his double jeopardy claim.

The Fifth Amendment provides, in pertinent part:

... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty or property, without due process of law. . . .

The Fourteenth Amendment provides, in pertinent part:

... nor shall any State deprive any person of life, liberty or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

Petitioner also relies on Article VI, §1 of the New Mexico Constitution which defines the judicial power of the state:

The judicial power of the state shall be vested in the senate when sitting as a court of impeachment, a supreme court, a court of appeals, district courts; probate courts, magistrate courts and such other courts inferior to the district court as may be established by law from time to time in any district, county or municipality of the state.

New Mexico municipal courts are created by enactment of N.M. Stat. Ann. §35-14-1 (1978), which provides, in part:

There is established a municipal court in each incorporated municipality. The municipal courts shall be presided over by municipal judges.

The applicable statutes governing prosecution in Petitioner's case are:

N.M. Stat. Ann §66-8-101 (1984 Cum. Supp.):

A. Homicide by vehicle is the killing of a human being in the unlawful operation of a motor vehicle.

B. Great bodily injury by vehicle is the injuring of a human being . . . in the unlawful operation of a motor vehicle.

C. Any person who commits homicide by vehicle or great bodily injury by vehicle while under the influence of intoxicating liquor or while under the influence of any drug or while violating Section 66-8-113 NMSA 1978 is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978 provided that violation of speeding laws as set forth in Motor Vehicle Code . . .

shall not per se be basis for violation of Section 66-8-113 NMSA 1978.

N.M. Stat. Ann. §66-8-102 (1984 Cum. Supp.) provides:

A. It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this state.

B. It is unlawful for any person who is under the influence of any drug to a degree which renders him incapable of safely driving a vehicle to drive any vehicle within this state.

. . .

D. Every person under first conviction under this section shall be punished by imprisonment for not less than thirty days nor more than ninety days or by a fine of not less than three hundred dollars (\$300) nor more than five hundred dollars (\$500), or both, provided that if the sentence is suspended in whole or part or deferred, the period of probation may extend beyond ninety days but shall not exceed three years. On a first conviction under this section, any time spent in jail for the offense prior to the conviction for that offense shall be credited to any term of imprisonment fixed by the court.

. . .

F. In the case of a first offense under this section, the magistrate court has concurrent jurisdiction with district courts to try the offender. This section does not affect the authority of a municipality under a proper ordinance to prescribe penalties for driving while under the influence of intoxicating liquor or drugs. A conviction under municipal ordinance prescribing penalties for driving while under the influence of intoxicating liquor or drugs shall be deemed a conviction under this section for purposes of determining whether a conviction in magistrate court is a second conviction.

N.M. Stat. Ann. §66-8-113 (1978) provides:

A. Any person who drives any vehicle carelessly and heedlessly in willful or wanton disregard for the rights and safety of others and without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property is guilty of reckless driving.

B. Every person convicted of reckless driving shall be punished upon a first conviction by imprisonment for not less than five days nor more than ninety days or by a fine of not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100), or both, and on a second or subsequent conviction, by imprisonment for not less than ten days nor more than six months, or by a fine of not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000), or both.

C. Upon conviction of violation of this section, the director may suspend the license or permit to drive and any nonresident operating privilege for not to exceed ninety days.

N.M. Stat. Ann §66-8-114 (1978) provides:

A. Any person operating a vehicle on the highway shall give his full time and entire attention to the operation of the vehicle.

B. Any person who operates a vehicle in a careless, inattentive or imprudent manner, without due regard for the width, grade, curves, corners, traffic, weather and road conditions and all other attendant circumstances is guilty of a misdemeanor.

STATEMENT OF THE CASE

Petitioner was convicted of vehicular homicide in New Mexico district court (J.A. 12-13), after having previously been convicted of lesser included traffic offenses in municipal court. Prior to the trial on the

felony, trial counsel filed a motion to dismiss the prosecution based on application of the Double Jeopardy Clause of the Fifth Amendment. (J.A. 7-8). The district court impliedly denied the motion, as the New Mexico Court of Appeals held, although a ruling on the motion does not appear in the record. 678 P.2d at 711.

Under New Mexico's rules of appellate procedure, trial counsel filed her docketing statement after giving notice of appeal. The docketing statement serves to focus the issues and facts for appeal, pursuant to Rule 205, Rules of Appellate Procedure for Criminal, Children's Court, Domestic Relations Matters and Worker's Compensation Cases (1983 Repl. Pamp.). Trial counsel raised the double jeopardy claim in the docketing statement, (J.A. 14-19), and the court assigned the cause to the summary calendar for reversal based upon its conclusion that Petitioner's claim in the state court was correct. (J.A. 20-21). The state accepted the factual recitations in the docketing statement, but challenged the legal conclusion reached by the court of appeals in its memorandum opposing summary reversal. 678 P.2d at 710-711. The court then re-assigned the cause to the legal calendar for briefing the issue:

Whether double jeopardy precludes a prosecution for Homicide by Vehicle concerning an incident where the defendant has previously been convicted of Driving While Intoxicated and Careless Driving.

Id. at 711.

Rule 207 of the appellate rules provides that upon assignment of a case to the legal calendar briefing proceeds without filing of a transcript, unless expressly ordered by the appellate court. In this case, the calendaring notice,

(J.A. 22), did not include an order that the transcript be filed and the court accepted the factual recitations in the docketing statement as the facts in the case. *State v. Clark*, 89 N.M. 695, 556 P.2d 851 (Ct. App. 1976). Thus, the facts in this case were agreed since the state did not challenge the accuracy of the docketing statement and these facts were adopted by the court in applying the principle of law disposing of Petitioner's issue on direct appeal.

The facts found by the New Mexico Court of Appeals follow:

The question arises because defendant was convicted in Carlsbad Municipal Court on pleas of nolo contendere, of careless driving and driving while under the influence of alcohol (DWI), in violation of municipal ordinances. The charges followed a three-car collision on August 12, 1981; the municipal court convictions were had on August 13th. On September 5, 1981, one of the persons injured in the accident died. On September 11, 1981, defendant was charged by criminal information in district court with vehicular homicide, the charge being alternatively in the language of the statute, NMSA 1978 §66-8-101 (Cum. Supp. 1982), and of NMSA 1978, UJI Crim. 2.60 (Repl. Pamp. 1982), to assert death or great bodily injury resulting from defendant's unlawful operation of a motor vehicle. Defendant filed a motion to dismiss on grounds of double jeopardy on February 1st; the jury was selected on February 2nd and a verdict returned on February 3rd. Although the record does not reflect a ruling by the court on defendant's motion, it is apparent from the course of proceedings that it was denied.

678 P.2d at 711. The court made two additional findings based on the course of proceedings. First, it expressly found that the state accepted that reckless driving and

careless driving were the same for double jeopardy purposes. *Id.* Second, it found that sufficient facts were available to the state to permit prosecution for vehicular homicide under the theory of great bodily injury, N.M. Stat. Ann. §66-8-101C (1984 Cum. Supp.), at the time the Petitioner was charged with the traffic offenses in municipal court. 678 P.2d at 712.

The state elected to litigate the issue of whether the "necessary facts" exception to the bar of double jeopardy, as articulated in *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed.2d 500 (1912), served to permit the felony prosecution since the victim of the accident had not died when the municipal court charges were tried. The court of appeals rejected the state's argument, holding that the alternative language of the state permitted prosecution for infliction of great bodily injury and that sufficient evidence was available to the state to afford prosecution at the time the traffic offenses were charged. 678 P.2d at 712.

The New Mexico Supreme Court issued its writ of certiorari to review the judgment of the court of appeals and reversed. The court held that the court of appeals had correctly ruled on the "necessary facts" exception of *Diaz*, as applied to the facts in Petitioner's case. 678 P.2d at 687. However, the court held that the "jurisdictional exception," also articulated by the Court in *Diaz* remained viable and served as an exception to the application of the double jeopardy bar in Petitioner's case. Thus, the New Mexico Supreme Court affirmed Petitioner's conviction for vehicular homicide. *Id.*

SUMMARY OF ARGUMENT

Petitioner challenges affirmance of his conviction for vehicular homicide by the New Mexico Supreme Court over his claim that this conviction is barred by the protec-

tions of the Double Jeopardy Clause. Petitioner was convicted of lesser included traffic offenses, DWI and careless driving, in municipal court prior to the state filing the felony charge against him in district court.

The New Mexico Court of Appeals reversed the felony conviction, holding that the municipal court convictions were for lesser included offenses of vehicular homicide. The court further concluded that neither "jurisdictional exception" nor the "necessary facts" exception to application of double jeopardy principles, as recognized in *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed.2d 500 (1912) would apply to sustain the felony conviction.

The New Mexico Supreme Court reversed the Court of Appeals and affirmed Petitioner's conviction, relying on the "jurisdictional exception" of *Diaz* in holding that conviction on the lesser included offenses in a court of limited jurisdiction did not bar subsequent prosecution for the felony in district court.

Petitioner contends that this Court has implicitly rejected the concept of the "jurisdictional exception" with its holdings in *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970), *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) and *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). In each of these cases, the Court held that an initial conviction on a lesser included offense triggered the protections of the Double Jeopardy Clause to bar subsequent prosecution for a greater offense.

In light of the recent analysis of the Double Jeopardy Clause and its application, Petitioner contends that the New Mexico Supreme Court has erred in its conclusion that the "jurisdictional exception" remains viable.

ARGUMENT

The New Mexico Supreme Court has consistently held that the "jurisdictional exception" recognized by this Court in *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed 500 (1912) remains a viable exception to the application of the Double Jeopardy Clause in New Mexico prosecutions. The New Mexico Supreme Court adopted this exception in *State v. Goodson*, 54 N.M. 184, 217 P.2d 262 (1950) and subsequently affirmed its applicability in *State v. James*, 93 N.M. 605, 603 P.2d 715 (1979). The issue presented by Petitioner Fugate's case is whether the New Mexico Supreme Court is correct in holding that the jurisdictional exception recognized in *Diaz* retains validity in light of subsequent decisions of this Court.

I. The protections of the Double Jeopardy Clause are generally applicable to Petitioner's claim

Petitioner's conviction in state court is subject to the full range of protections accorded by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. In *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), the Court concluded:

The Court has held today, in *Benton v. Maryland*, (citation omitted) that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution after conviction. And it protects against multiple punishments for the same offense.

395 U.S. at 717.

Because the Court held that the range of protections afforded by the Double Jeopardy Clause is fully applicable to state prosecutions, *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), New Mexico is bound by federal constitutional protection and interpretation with regard to exceptions to application of the double jeopardy bar. Thus, unless the jurisdictional exception recognized by the Court in *Diaz* remains viable, the New Mexico Supreme Court erred in reversing the Court of Appeals, 678 P.2d at 687, and affirming Petitioner's conviction for vehicular homicide after he had previously been convicted of DWI and reckless, or careless, driving in municipal court.

In evaluating whether a subsequent prosecution is for the "same offense," the Court has relied on analysis advanced in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed 306 (1932), where the Court observed:

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

284 U.S. at 304. New Mexico courts have adopted this approach, holding that the test to be used is "whether the facts offered in support of one [offense], would sustain a conviction of the other." *Owens v. Abram*, 58 N.M. 682, 684, 274 P.2d 630 (1954), cert. denied, 348 U.S. 917, 75 S.Ct. 300, 99 L.Ed. 719 (1955).

In *Brown v. Ohio*, 431 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), the Court construed "same offense" to focus on applicability of Double Jeopardy Clause protection to prosecutions involving greater and lesser included offenses. The Court held that an initial conviction

for operating an automobile without the owner's consent barred a subsequent prosecution for theft of the same automobile, construing the two prosecutions to be based on the same offense. The Court relied on *In re Nielsen*, 131 U.S. 176, 188, 9 S.Ct. 676, 33 L.Ed. 118 (1889), in pointing out that the double jeopardy protection precluded an individual twice being placed in jeopardy for the same offense, rather than simply tried for the same offense twice. Since jeopardy attaches with prosecution for either a greater or lesser included offense, any subsequent prosecution for an included offense arising from the same pattern of facts is barred. Thus, the protection of the Double Jeopardy Clause is broader than simply protection from multiple prosecutions for the same offense. Rather, it protects against successive prosecutions once the accused has been placed in jeopardy for any offense which could have initially been prosecuted arising from the same facts, whether for a greater or lesser charge. For instance, applying this rationale the Court held in *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) that prosecution for felony murder resulting in conviction barred any subsequent prosecution on the underlying felony. See also *Payne v. Virginia*, ___ U.S. ___, 104 S.Ct. 3573, 82 L.Ed.2d 801 (1984) (following *Harris*).

The Court considered application of double jeopardy protections to facts similar to those presented in Petitioner's case in *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). There, the accused had been convicted of failing to slow his automobile to avoid an accident prior to filing of involuntary manslaughter charges against him in juvenile court. The Court held that if the state relied on the traffic infraction to prove a necessary element in the manslaughter prosecution, a

substantial double jeopardy claim would be demonstrated. Because the Court found it impossible to determine whether the state would rely on the traffic infraction to prove its manslaughter case, the Court remanded the cause to the Illinois courts to determine whether the proper relationship between the traffic offense and manslaughter charge existed so that the conviction on the lesser included offense would bar further prosecution.

The lengthy history of decisions in this Court establishes quite clearly that Petitioner Fugate has demonstrated a substantial claim of double jeopardy based on the lesser included offense analysis advanced in *Blockburger*. The New Mexico Court of Appeals held that the state had conceded that Petitioner's conviction in municipal court for careless driving was identical to the reckless driving element of N.M. Stat. Ann. §66-8-101(C) (1984 Cum. Supp.). 678 P.2d at 711. This conclusion was implicitly accepted by the New Mexico Supreme Court, which narrowed its basis for decision to application of the jurisdictional exception. 678 P.2d at 687.

Petitioner recognizes that tension exists between the statutory elements analysis of *Blockburger* and the test employed by the majority in *Illinois v. Vitale*, which focuses on the evidence and theory of the offense relied on by the state in the subsequent felony prosecution. See, dissenting opinion of Rehnquist, J., in *Thigpen v. Roberts*, ___ U.S. ___, 104 S.Ct. 2916, 2920, 82 L.Ed.2d 23 (1984).

In Petitioner's case, however, the felony prosecution was commenced under a tightly drawn vehicular homicide statute in contrast to the general manslaughter statute reviewed in *Thigpen v. Roberts*. Section 66-8-101(C) requires the state to prove either that the homicide occurred

while the accused was driving while intoxicated or while he was driving recklessly. The Court of Appeals concluded that Petitioner's convictions in municipal court were for lesser included offenses of the greater offense. This situation distinguishes the facts in Fugate's case from those considered by the New Mexico Supreme Court in *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975). There, the court discussed the "same evidence" and "same transaction" tests in analyzing double jeopardy claims, concluding that New Mexico could properly apply the same evidence test in rejecting the defendant's claim that his prosecution for vehicular homicide was barred by a prior conviction for DWI. Applying the "same evidence" test, the court held that the felony prosecution was not barred, while relying on the "jurisdictional exception" earlier recognized in *State v. Goodson*, as the basis for its decision. As Justice Sosa pointed out in his *Tanton* concurrence, however, the vehicular homicide prosecution could have proceeded on the theory that defendant's recklessness, rather than intoxication, was the essential element of the felony. The prosecution reviewed in the case at bar could not have been predicated on an alternative theory, since either statutory theory would have implicated one of Fugate's misdemeanor convictions.

Regardless of whether the statutory elements test or evidence relied on test is applied to review Petitioner's claim, or whether the claimed distinction between the "same evidence" and "same transaction" test is valid, the facts in this case bring Petitioner's claim within the most narrowly drawn approach which might be employed by the Court. The offenses were lesser included offenses under the applicable statutory language; they arose from the same transaction; and the same evidence would have been necessary to prove vehicular homicide under either

theory which was earlier used to convict Fugate of DWI and reckless driving.

The conclusion of the New Mexico Court of Appeals that the vehicular homicide prosecution required proof of either DWI or reckless driving, 678 P.2d at 711, and accepted by the New Mexico Supreme Court in its decision, 678 P.2d 686, is binding on this Court. *Illinois v. Vitale*, 447 U.S. at 416.

Applying either the *Blockburger* or *Illinois v. Vitale* tests to lesser included offense analysis, the Double Jeopardy Clause is fully applicable to the claim raised by Petitioner in the New Mexico courts.

II. The New Mexico Supreme Court erred in holding that the "jurisdiction exception" remains a viable exception to the protection afforded by the Double Jeopardy Clause

In holding that Petitioner's municipal court convictions did not bar subsequent conviction for vehicular homicide, the New Mexico Supreme Court reaffirmed its commitment to application of the jurisdictional exception recognized in *Diaz v. United States*. The court, in fact, limited its holding to this point, accepting for purposes of argument that all premises otherwise necessary to demonstrate a substantial double jeopardy claim were present in Fugate's case. Relying on its more developed discussion of the rule in *State v. Manzanares*, 100 N.M. 621, 674 P.2d 511 (1984), *cert. pending*, No. 83-6361, the Court held that the decision in *Illinois v. Vitale* did not require a different result. In *Manzanares*, the court had held that neither *Illinois v. Vitale* nor *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970) had implicitly rejected the *Diaz* jurisdictional exception because "the facts in those cases would not support a claim of the jurisdictional

exception and therefore the issue was not addressed by the United States Supreme Court." 674 P.2d at 513.

Petitioner Fugate contends that the New Mexico Court of Appeals correctly held that the concept of "jurisdictional exception" has been rejected in more recent decisions of this Court.

A. The exception recognized in *Diaz v. United States*

Petitioner notes at the outset that the Court recognized two exceptions to application of the double jeopardy protections in *Diaz*. The facts there involved a conviction in a Philippine justice of the peace court for assault and battery which proceeded prosecution for homicide. The justice of the peace court lacked jurisdiction over the greater offense and the Court held, in light of the jurisdictional limitation that the two offenses, "although identical in some of their elements, were distinct offenses both in law and fact." 223 U.S. at 448-449. The Court concluded that the conviction for assault and battery would only bar a second prosecution for assault and battery in the justice court and would not serve to bar the homicide prosecution. The limitation on jurisdiction of the justice court, the Court observed, precluded treatment of the assault and battery as an "included . . . lesser offense." 223 U.S. at 449.

The second exception recognized by the *Diaz* Court and also relied on by the state in the New Mexico Court of Appeals, 678 P.2d at 711, involves lack of essential facts available to support prosecution for a greater offense at the time of conviction for a lesser included offense. The *Diaz* Court had observed:

The death of the injured person was the principal element of the homicide, but was no part of the as-

sault and battery. At the time of trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense.

223 U.S. at 449. This exception apparently remains viable. See *Brown v. Ohio*, 432 U.S. at 169, n. 7; *Culberson v. Wainwright*, 453 F.2d 1219 (5th Cir. 1972), cert. denied, 407 U.S. 913, 92 S.Ct. 2449, 32 L.Ed.2d 688 (1972).

This "essential facts" exception was argued by the state on appeal in Petitioner's case, but was rejected by the Court of Appeals. Even though the death occurred after conviction for the traffic offenses, the court noted that under the vehicular homicide statute the state was required to prove either a death or that the victim had sustained "great bodily injury." 678 P.2d at 711.

Since evidence of "great bodily injury" was available to the state at the time of trial on the municipal court charges, the Court of Appeals reasoned that the "essential facts" were available to the state at that time to commence the vehicular homicide prosecution, particularly since the same penalty is authorized by §66-8-101(C) regardless of whether the state proves a death or great bodily injury. The New Mexico Supreme Court expressly agreed with the Court of Appeals, limiting its ruling to application of the jurisdictional exception. 678 P.2d at 687. Thus, because New Mexico has enacted a statute sufficiently broad to encompass all serious injuries resulting from accidents attributable to DWI or recklessness in driving, the state in Petitioner's case was not precluded from prosecuting him for vehicular homicide and the underlying offenses in a single proceeding.

B. The internal weakness in the jurisdictional exception analysis advanced by the Diaz Court

The *Diaz* Court held that the accused's conviction for assault and battery could not be treated as a lesser included offense because of the limited jurisdiction of the Philippine justice of the peace court. This analysis has been impliedly rejected by the Court in all leading decisions concerning application of double jeopardy protections to lesser included offenses. In *Blockburger*, for instance, the Court determined that the lesser included offense analysis should proceed from comparison of statutory provisions. In *Illinois v. Vitale*, a majority of the Court held that double jeopardy protections could be properly invoked if the evidence relied on by the state in a subsequent prosecution had already formed the basis for separate prosecution on included offenses.

The *Diaz* Court's approach to lesser included offense analysis simply does not comport with more recent lines of analysis of the problem undertaken by the Court. The theory relied on by the *Diaz* cannot be rationalized with the decisions rendered in *Brown v. Ohio* and *Waller v. Florida* since in both the Court held that prosecutions in courts of general jurisdiction were barred by prior conviction for lesser included offenses. The jurisdictional exception is flawed by the fact that its application proceeds from consideration of jurisdictional limitations placed upon the lower court, rather than from analysis of the elements or evidence involved in the offenses under scrutiny.

C. Rejection of the "dual sovereignty" doctrine in *Waller v. Florida*

The "jurisdictional exception" recognized by the Court in *Diaz* did not expressly arise in the context of prosecutions commenced by different levels of government. How-

ever, in *Waller v. Florida*, the Court confronted the issue of whether a conviction in a municipal court would bar subsequent prosecution in a state court of general jurisdiction for a greater offense. The accused had been convicted of a lesser included offense in municipal court of the grand larceny with which he was subsequently charged by information. The Florida appellate courts concluded that the Double Jeopardy Clause did not bar the subsequent prosecution.

The Court held, however, that Florida's treatment of its municipalities as separate sovereigns for purposes of double jeopardy analysis was incorrect, concluding:

In this context a 'dual sovereignty' theory is an anachronism, and the second trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution.

397 U.S. at 395.

While rejection of the "dual sovereignty" concept did not expressly negate the validity of the "jurisdictional exception," it did so by implication. See *Culberson v. Wainwright*, 453 F.2d at 1220. The New Mexico Court of Appeals reached this same conclusion in *Fugate*, adhering to the "unmistakable rejection by the United States Supreme Court of the *Diaz* 'jurisdictional exception.'" 678 P.2d at 711.

In *Waller*, the rejection of the "dual sovereignty" concept was articulated in light of the fact that the initial conviction obtained in municipal court was for violation of a municipal ordinance, suggesting that the municipal court did not have jurisdiction over the subsequent felony. The exact scope of the Court's holding is important for disposition of Petitioner's claim:

We decide only that the Florida courts were in error to the extent of holding that—

"even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court."

397 U.S. at 395. The Court's ruling clearly controls the facts in Petitioner's case: his prosecution in state court for the same offense for which he had already been convicted in municipal court violates the double jeopardy protections of the Fifth Amendment. The issue of continuing validity of the jurisdictional exception was impliedly considered and rejected by the Court, despite the New Mexico Supreme Court's contrary conclusion in *Manzanares*. 674 P.2d at 513.

Subsequent decisions of this Court have involved fact patterns similar to that considered in *Waller*. For instance, in *Robinson v. Neil*, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973), the Court held that *Waller* was to be applied retroactively, ruling that defendant's conviction for assault and battery—in violation of a municipal ordinance—obtained in municipal court barred a subsequent prosecution for assault with intent to commit murder in state court. Similarly, in *State v. Burroughs*, 149 Ga. App. 183, 254 S.E.2d 144 (1979), reversed, 244 Ga. 288, 260 S.E.2d 5, vacated 448 U.S. 903, 100 S.Ct. 3044, 65 L.Ed.2d 1134 (1980), opinion on remand, 246 Ga. 393, 271 S.E.2d 629 (1980), the Court ordered the Georgia Supreme Court to reconsider its affirmance of the defendant's conviction in state court in light of *Illinois v. Vitale* where he had previously been convicted in municipal court for a greater offense. On remand, the Georgia Supreme Court applied the rule of *Harris v. Oklahoma* and *Payne v. Virginia* in holding that prosecution for a greater

offense bars subsequent prosecution for a lesser included offense. Although not noted in the Court's opinion in *Brown v. Ohio*, the petitioner's initial conviction in that case was apparently obtained in a municipal court, as well. See Brief for Petitioner, *Brown v. Ohio*, at 5.

The conclusion that *Waller* implicitly overrules *Diaz* with regard to the viability of the "jurisdictional exception" has been reached by a number of courts which have either expressly or impliedly considered the question. *Abramson v. Griffin*, 693 F.2d 1009 (10th Cir. 1982) (applying collateral estoppel principle of *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) in holding district court prosecution for greater offense barred by prior dismissal of charges in New Mexico municipal court which reflected failure of proof on identification of defendant); *Pettyjohn v. Evatt*, 369 F.Supp. 865, 872 (E.D. Tenn. 1974), affirmed, 500 F.2d 1403 (6th Cir. 1974) (rejecting "jurisdictional exception" in light of *Robinson v. Neil*); *State v. Laguna*, 124 Ariz. 129, 602 P.2d 847, 848 (Ct. App. 1979); *State v. Anonymous*, 31 Conn. Sup. 292, 329 A.2d 136 (1976); *State ex rel. Seal v. Shepard*, 299 So.2d 644, 645 (Fla. App. 1974); *State v. Foy*, 401 So.2d 948, 949 (La. 1981); *Matter of Castrillo*, 293 N.W.2d 839 (Minn. 1980); *Yother v. State*, 36 Mont. 1192, 597 P.2d 79, 82 (1979); *State v. Dively*, 92 N.J. 573, 458 A.2d 502, 509 (1983); *Benard v. State*, 481 S.W.2d 427, 428 (Tex. Crim. App. 1972); and *Rouzie v. Commonwealth*, 207 S.E.2d 854, 856 (Va. 1974).

Petitioners submits that *Waller* should be read to overrule *Diaz* by implication with respect to the continuing validity of the "jurisdictional exception." The New Mexico Supreme Court erred in holding that *Waller* and *Illinois v. Vitale* did not require application of the double jeopardy bar to prosecutions commenced in a court of general juris-

diction following conviction for a lesser included offense in a court of limited jurisdiction. In *Fugate's* companion case, *State v. Padilla*, 101 N.M. 58, 678 P.2d 686 (1984), reversing 100 N.M. 78, 678 P.2d 706 (Ct. App. 1983), the New Mexico Supreme Court applied the jurisdictional exception to hold that a magistrate court conviction for a lesser included offense, resisting arrest, did not bar subsequent prosecution for the felony offense of battery on a peace officer. On facts similar to those in *Robinson v. Neil*, the New Mexico Supreme Court applied the jurisdictional exception to authorize a fragmented prosecution, even though it was clearly possible for the state to bring all charges in a single prosecution in the district court. The rationale supporting the *Waller* rule correctly operates to hold that such fragmentation of prosecution violates the Double Jeopardy Clause by subjecting an accused to multiple prosecutions and multiple punishments for offenses predicated on the same evidence and arising from the same transaction. 678 P.2d at 708-709.

III. There exists no substantial justification for resurrecting the "jurisdictional exception" recognized in *Diaz v. United States*

The opinion of the New Mexico Supreme Court in *Manzanares* suggests a willingness on that court's part to dilute the protections of the Double Jeopardy Clause to avoid situations in which defendants "abuse the multi-level judicial system which exists in New Mexico and in other jurisdictions." 674 P.2d at 514. The court observed:

The problem with tests that do not recognize the jurisdictional exception is that they allow defendants to abuse the multi-level judicial system which exists in New Mexico and in other jurisdictions. Without the exception, a defendant can plead guilty to all misdemeanor charges arising from a criminal act in

magistrate court and never be in jeopardy of a felony prosecution involving similar evidence in the district court. Using an analogy similar to that used by this Court in *Goodson*, reason and logic do not support a rule where one guilty of a crime of homicide by vehicle may escape a possible sentence of three years imprisonment by the expedient of pleading guilty to a charge of DWI or reckless driving where the penalty may be as low as a \$25.00 fine and five days in jail.

Id. This same concern has been expressed by other courts and is evident in Justice Rehnquist's opinion in *Robinson v. Neil*, in which the Court held that *Waller* would be given retroactive effect:

If the offense involved was a serious one under state law, as it apparently was in this case, the defendant may have been unintentionally accorded a relatively painless form of immunity from state prosecution.

409 U.S. at 510. The same type of concern was amplified by Judge Dennis in his dissenting opinion in *State v. Foy*, 401 So.2d at 952, except that he argued that because of this situation, the Double Jeopardy Clause should not be construed to bar the subsequent prosecution. *Cf. Benard v. State*, 481 S.W.2d at 429-431 (Roberts, J., opinion on motion for rehearing) (carefully defining limitations of double jeopardy bar when applied to lesser included offense prosecutions).

An additional suggestion of concern over the prospect that the double jeopardy bar is inappropriately applied to situations involving initial convictions in courts of limited jurisdiction is apparent in the dissenting opinion of Justice O'Connor in *Thigpen v. Roberts*, 104 S.Ct. at 118-119. There, Justice O'Connor argued that the defendant's use of the *de novo* appeal procedure in Mississippi courts essentially resulted in his suffering no punishment as a

consequence of his initial conviction in the court of limited jurisdiction. Arguably, the Court might conclude that an accused could waive the protections of the Double Jeopardy Clause in taking a *de novo* appeal if properly advised that waiver would result from taking advantage of the procedure. *Cf. Colten v. Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972) (holding that increase in punishment upon conviction after trial *de novo* not necessarily barred by Double Jeopardy Clause).

Neither of these concerns provides a substantial justification for resurrecting the "jurisdictional exception" of *Diaz* in light of the later decisions in *Waller*, *Robinson v. Neil*, *Brown v. Ohio*, or *Illinois v. Vitale*.

A. The proper vehicle for resolving administrative problems associated with multiple prosecution is exercise of rule-making or legislative power

The concern expressed by the New Mexico Supreme Court in its decision in *Manzanares* reflects a failure of its earlier admonition in *State v. Tanton* to correct administrative problems which result in multiple prosecutions. There, the court had noted:

The situation presented here could easily have been avoided by a modicum of cooperation between the respective prosecutors. Moreover, proceedings pending in an inferior court ought to be abated when charges are instituted in district court in relation to the same episode. A defendant in such a situation would have a right to move the inferior court for an abatement to abide the event in district court. Should a defendant in such a case, for whatever reason, fail to so move, he might well have waived any right to complain of piecemeal prosecution. Such procedures would promote judicial economy. The overriding state interest is the efficient prosecution of all crimes and especially felonies.

540 P.2d at 816. In *Manzanares*, the court recognized that the problem of multiple prosecutions continued to characterize the New Mexico criminal system:

As we indicated in *Tanton*, this situation could be avoided by a modicum of cooperation between prosecutors. [citation omitted]. However, there does not seem to be a practical way to enforce this type of cooperation. It can only be encouraged by the courts.

674 P.2d at 514.

The failure of the court's directive in *Tanton* simply does not justify New Mexico's continued application of the jurisdictional exception in the wake of the numerous rulings of this Court overruling it by implication. In fact, the most expeditious way to resolve this problem is not to reward prosecutorial violation of the *Tanton* directive by applying the jurisdictional exception, but to penalize lack of communication and cooperation among the various agencies and prosecutor's offices by strictly applying the Double Jeopardy Clause to bar subsequent prosecutions.

The problem may also be addressed through legislation or rule-making. For example, in *Illinois v. Vitale*, an alternative basis for relief under state law originally relied upon by the petitioner's trial court was the Illinois statute which required that all offenses based on the same conduct be prosecuted in a single prosecution. 447 U.S. at 413; 421, n. 10. Similarly, in *Matter of Castrillo*, the Minnesota court noted that a state statute required prosecution of all offenses arising from the same transaction or conduct in a single case. 293 N.W. at 841. Adoption of legislation designed to achieve this result would serve the goal of eliminating piecemeal prosecution.

Similarly, under the New Mexico Supreme Court's rulemaking power, the state could be required to bring all

criminal charges arising from the same event in a single charging instrument in a court of general jurisdiction. The court has already acted to promote judicial efficiency in its adoption of Rule 37, Rules of Criminal Procedure for the District Courts (1978), which requires commencement of prosecutions within a set time period to promote efficiency in the state's trial courts. *State v. Flores*, 99 N.M. 44, 653 P.2d 875, 877 (1982). The New Mexico appellate courts have consistently held that the supreme court is empowered to "prescribe and regulate pleadings, practice and procedure in all courts in New Mexico, including lower courts," *State v. Garcia*, ___ N.M. ___, 680 P.2d 613, 615-616 (Ct. App.), cert. quashed, ___ N.M. ___, ___ P.2d ___ (1984).

Whether by statute or rule-making, the correct solution to problems posed by multiple prosecutions should not be addressed through an arbitrary limitation upon the guarantees of the federal Due Process Clause. Otherwise, the ability of this Court to rely on state appellate courts to implement federal constitutional guarantees, *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), will be inherently compromised.

Alternatively, the New Mexico Legislature might resolve this problem, in part, by revoking its grant of concurrent jurisdiction to the magistrate and municipal courts to try first offender DWI cases. N.M. Stat. Ann. § 66-08-102F (1984 Cum. Supp.). By requiring all DWI cases to be tried in the district court, the legislature would facilitate cooperation among prosecutors and presumably reduce the possibility that a vehicular homicide prosecution based on intoxication of the driver would be barred by double jeopardy principles. In *Thigpen v. Roberts*, amici curiae argued essentially that the protections of the Double Jeopardy Clause should not reach to

bar manslaughter and vehicular homicide prosecutions because of prior adjudications of DWI charges. *See* Brief for Amici Curiae, National District Attorneys Association and Mississippi Prosecutors Association, Point II. Appropriate legislative action would achieve the same result by requiring the state to bring all charges in a single prosecution without requiring the Court to reverse its prior holdings to reach the result desired by amici by altering the meaning of the Clause in a single class of cases. Since the Court has, without hesitation, applied the protections of the Double Jeopardy Clause in the most serious of prosecutions, *Harris v. Oklahoma* (felony murder); *Payne v. Virginia* (capital murder and armed robbery), alteration of existing law to redress administrative problems in the prosecution of manslaughter and vehicular homicide cases is not justified.

B. The solution to multiple prosecutions problems should not require limitations on the substantive rights of criminal defendants

In *Tanton*, the New Mexico Supreme Court suggested that the burden to seek abatement of proceedings in the court of limited jurisdiction while felony prosecution proceeds should be placed upon the defendant. The court implied that a defendant who did not seek abatement might be deemed to have waived his double jeopardy rights in permitting the misdemeanor prosecution to proceed to adjudication. The *Manzanares* court pointed to the flaw in this suggestion, noting:

The Court in *Tanton* also suggested that the defendant could move to abate the lower court proceeding so the matter could be determined by a court with jurisdiction to hear all the charges. It does not seem likely that a defendant would make this motion if it

would subject him to the possibility of a more severe penalty.

674 P.2d at 514. This observation recognizes the inherent contradiction in requiring the defendant to monitor the proceedings in courts of different jurisdictions to protect the interest of the state in convicting him of the greatest charge brought against him. The *Tanton* court's suggestion is wholly inconsistent with the concept of an adversarial system in which the state carries the sole burden of proving the charges against the accused. *See generally, Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (holding that state's burden is proof of each element of the offense charged beyond a reasonable doubt).

Petitioner is aware, of course, of this Court's concern that the protections of the Double Jeopardy Clause not be unilaterally manipulated by the accused to deprive the state of its right to prosecute offenders. *Ohio v. Johnson*, ___ U.S. ___, 104 S.Ct. 2536, 2542, 81 L.Ed.2d 425 (1984). The facts in *Ohio v. Johnson*, as well as the facts in *Thigpen v. Roberts*, suggest manipulation of the criminal justice system in an effort to gain the benefits of double jeopardy protection including the "relatively painless form of immunity from state prosecution" noted by Justice Rehnquist in the majority opinion in *Robinson v. Neil*. Petitioner Fugate had already been convicted in municipal court when the felony charge for vehicular homicide was filed, as the New Mexico Court of Appeals opinion makes clear. 678 P.2d at 711. There was no pending greater charge which he intelligently sought to avoid by entering his nolo contendere pleas to the charges in municipal court. Nor did he seek to appeal from the convictions obtained on his plea in an attempt to avail himself of the "offer in settlement" and then seek to better

his position in a trial *de novo*, as the dissenters suggested in *Thigpen v. Roberts*.

Petitioner subjected himself to the statutory range of punishment available to the municipal court under N.M. Stat. Ann. § 66-8-102D (1984 Cum. Supp.). This punishment range included imprisonment for a period of thirty to ninety days and a fine of not less than \$300 nor more than \$500. The judge is empowered to suspend the sentence in whole or part and impose a period of probation which may not exceed three years. The docketing statement, (J.A. 15), recites that the actual punishment assessed by the municipal court was confinement in the Alcohol Care Unit in Hobbs, New Mexico, for a period of twenty-one days to be followed by a six month period of weekly alcohol counseling sessions. After completion of the period of confinement and partial completion of counseling, the court dismissed the charges. Thus, in entering his plea of *nolo contendere* and completing the sentence imposed to the satisfaction of the sentencing court, Petitioner accepted the judgment of the criminal justice system without any attempt to manipulate it for a more favorable result.

The flaw in the dissent's argument in *Thigpen v. Roberts* is apparent when the consequence of the first conviction are considered in Petitioner's case. Had he taken an appeal and invoked the right to trial *de novo* he would have remained subject to the range of punishment available to the sentencing court, including the possibility, following *Colten v. Kentucky*, of a greater punishment being imposed by the judge following a jury or bench trial in district court. The majority disposition in *Thigpen v. Roberts* was correct because there the state was not content to simply re-try the accused, as *de novo* trial would have required, but instead sought to impose greater

punishment, unilaterally dismissing the charge on which the accused was initially convicted.

At the time Petitioner's case was heard in the municipal court the state had sufficient facts available to charge the felony offense of vehicular homicide based on the allegation that his conduct caused "great bodily injury" to another. (J.A. 9—jury instruction; 5–6 information). 678 P.2d at 711. The information ultimately filed, in fact, charged this theory alternatively. Both the court of appeals and the supreme court held that the state was in a position to charge this offense at the time of adjudication of Petitioner's traffic offenses in municipal court. 678 P.2d at 711; 678 P.2d at 687. In these circumstances, it is clear that the state's negligent or intentional failure to charge the felony and lesser included offenses in a single instrument in a court of general jurisdictional has created the double jeopardy problem in this case, rather than any manipulation of the courts by Petitioner. The *Manzanares* court clearly pointed out that the district court in New Mexico is empowered to hear all the charges of the type concerned in Petitioner's prosecution. 674 P.2d at 514.

The facts in Petitioner's case do not suggest any justification for reversal of the Court's implicit overruling of *Diaz* with respect to the "jurisdictional exception" there recognized. Petitioner Fugate was convicted and sentenced in the municipal court prior to the state filing the information alleging the greater felony offense in district court. His entitlement to the protections of the Double Jeopardy Clause flows from the state's inability or deliberate lack of coordination in prosecution, rather than from his exercise of any options which might objectively be described as "manipulation" of the criminal justice system. If action is required to avoid application of the double

jeopardy bar to future felony prosecutions, it should include strong commitment by the New Mexico Supreme Court to principles articulated by this Court with regard to constitutional protections. Correction of administrative irregularities might best be promoted through legislation. A clear example is the legislative reform undertaken by Mississippi to broaden the statutory language to permit prosecution for vehicular homicide when serious bodily injury results to the victim. *Thigpen v. Roberts*, Brief for Respondent, at 9. This legislative action addresses the problem of vehicular homicide prosecution in much the same way that the New Mexico statute involved here does, by broadening the prosecutor's discretion in charging to enable all offenses arising from the same episode to be tried swiftly and in a single proceeding. Alternatively, the proper result could be reached by the New Mexico Supreme Court exercising its rule-making power to require the state to bring all charges in a single instrument in a court of general jurisdiction.

Dilution of the protections of the Double Jeopardy Clause is not necessary to properly redress the problems noted by the New Mexico Supreme Court in its justification for continued application of the "jurisdictional exception."

CONCLUSION

Petitioner's case presents a straightforward question of law based on facts essentially undisputed in the New Mexico appellate courts. 678 P.2d at 711; 687. Unlike other cases which have troubled the Court, *Illinois v. Vitale*; *Illinois v. Zegart*, 452 U.S. 948, 101 S.Ct. 3094, 69 L.Ed.2d 961 (1981) (Burger, C.J., dissenting from denial of *certiorari*), this case does not require consideration of whether the "same transaction" or "same evidence" test

should be applied in analyzing lesser included offenses, nor an actual interpretation of the offenses based on either analytical framework. The New Mexico Court of Appeals resolved this issue favorably to the Petitioner upon concession by the state, 678 P.2d at 711, and in its review, the state supreme court impliedly accepted the lesser included offense analysis. 678 P.2d at 687.

Petitioner asserts that the "jurisdictional exception" to the double jeopardy principle involved here—which should have afforded him relief from his conviction for vehicular homicide—has been rejected by implication in decisions of this Court following *Diaz v. United States*. The continued adherence to this exception by the New Mexico Supreme Court implicates more than just its effect in affirming Petitioner's multiple convictions and multiple punishments inflicted for the same offense. The state court also failed to discharge its duty in the federal, constitutional judicial system of faithfully implementing the decisions of this Court which involve a matter of federally protected rights.

The attitude of the New Mexico Supreme Court is reflected in its decision reversing the court of appeals in *State v. Manzanares*. The court held:

The Court of Appeals is to be governed by the precedents of this Court. *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973). This is true even when a United States Supreme Court decision seems contra. *Id.* at 718, 507 P.2d at 779; see also *Salazar v. State*, 82 N.M. 630, 485 P.2d 741 (1971). If *James* is to be overruled this Court must do it. A more proper course would have been certification of the question to this Court for a determination of whether *James* is still applicable in light of *Illinois v. Vitale*. (citation omitted).

674 P.2d at 512.

Petitioner believes that the New Mexico Court of Appeals correctly interpreted its duty to abide by the decisions of this Court with respect to interpretation of the federal constitution. Further, to require an intermediate court of appeals to await sanction by the court of last resort in its jurisdiction before applying decisions of this Court to pending cases would serve to frustrate the expectations of individual litigants seeking review of constitutionally based claims. It would also serve to promote the exact type of delay and judicial inefficiency that the New Mexico Supreme Court complained of in reviewing the piecemeal prosecution in *Tanton*, particularly if the court of appeals were required to certify each question raising constitutional claims to the state supreme court in light of applicable decisions of this Court.

The unbroken chain of decisions following *Waller v. Florida* unequivocally demonstrates this Court's commitment to its conclusion there that the "dual sovereignty doctrine," the underpinning of the concept of the "jurisdictional exception" is not viable as a basis for avoiding application of the Double Jeopardy Clause to state prosecutions. Given its reliance on these decisions in *Fugate* and its companion, *Padilla*, the New Mexico Court of Appeals correctly held that the state's prosecution of Petitioner for vehicular homicide was improper. *Padilla*, 678 P.2d at 708-709; *Fugate*, 678 P.2d at 711.

Petitioner *Fugate* moves the Court vacate the judgment of the New Mexico Supreme Court and reverse his conviction for vehicular homicide which was obtained in violation of the Double Jeopardy Clause of the Fifth Amendment.

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 83-6663

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IN THE
Supreme Court of the United States

October Term, 1984

CHARLES FUGATE,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW MEXICO

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner Fugate was subjected to double jeopardy as a result of being first convicted of two minor traffic offenses and then convicted of felony vehicular homicide in separate court proceedings?

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW MEXICO

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

Petitioner Fugate sets forth the applicable opinions of the
New Mexico appellate courts. (Pet. Brief, 1)

JURISDICTION

Petitioner Fugate sets forth the applicable jurisdiction of this Court. (Pet. Brief, 1)

CONSTITUTIONAL, STATUTORY AND MUNICIPAL ORDINANCE PROVISIONS

Petitioner Fugate sets out the constitutional and statutory provisions applicable in the case. (Pet. Brief, 1-4) Respondent State of New Mexico includes the following City of Carlsbad Ordinances in pertinent part. They are set out in full in the Appendix.

12-6-12 DRIVING REGULATIONS AND OFFENSES

12-6-12.1 OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF INTOXICATING LIQUOR.

A. It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this municipality. It is unlawful for any person who has one-tenth of one percent or more by weight of alcohol in his blood to drive any vehicle within this state. (66-8-102 NMSA 1978 as amended)

* * *

12-6-12.2 OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF DRUGS.

A. It is unlawful for any person who is a habitual user of, or under the influence of, any narcotic drug, or who is under the influence of any other drug to a degree which renders him incapable of safely driving a vehicle, to drive or be in actual physical control of any vehicle within this municipality.

* * *

12-6-12.3 RECKLESS DRIVING.

A. Any person who drives any vehicle carelessly and heedlessly in willful or wanton disregard of the

rights or safety of others and without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property is guilty of reckless driving. (66-8-113 NMSA 1978)

B. Any person arrested under this subsection may be found guilty of the lesser included offense of careless driving. (*)

12-6-12.4 CARELESS DRIVING

A. Any person operating a vehicle on the street shall give his full time and entire attention to the operation of the vehicle.

B. Any person who operates a vehicle in a careless, inattentive or imprudent manner, without due regard for the width, grade curves, corners, traffic, weather and road conditions and all other attendant circumstances is guilty of careless driving. (66-8-114 NMSA 1978)

* * *

An asterisk (*) at the end of a paragraph indicates that there are no comparable provisions in the state code.

* * *

STATEMENT OF THE CASE

Petitioner Fugate sets forth the Statement of the Case and Respondent State of New Mexico does not believe any additions are necessary. Respondent does except to Petitioner's assertion in his Statement of the Case that the municipal court convictions were for "... lesser included traffic offenses ..." (Pet. Brief, 4)

SUMMARY OF ARGUMENT

Petitioner Fugate has not been twice convicted for the "same offense." His latter conviction for vehicular homicide was not the same offense as either of his previous traffic convictions, all of which arose out of the same automobile accident.

The "same offense" definition set forth in *Blockburger v. United States*, 284 U.S. 299 (1932) was reaffirmed and applied in *Illinois v. Vitale*, 447 U.S. 410 (1980). *Vitale* held that if the greater offense does not always entail proof of the elements necessary to prove the "lesser" offense, the two are not the same offense for jeopardy purposes.

In New Mexico, the crimes of Homicide by Vehicle, Driving While Under the Influence of Intoxicating Liquor (DWI) and Reckless Driving are not the same offenses. Under New Mexico law, vehicular homicide may be committed by numerous means of unlawfully operating a motor vehicle. These means can include, but do not always require, proof of DWI or reckless driving, the previous traffic convictions in this case. New Mexico caselaw, consistent with the analysis in *Vitale*, holds that the minor convictions in this case are not lesser included offenses of felony vehicular homicide. Therefore, they are not the "same offenses" as vehicular homicide. Therefore, the prohibition against double jeopardy is inapplicable in this case. Fugate's homicide conviction should be affirmed on this basis.

The "jurisdictional exception" rule to the prohibition against double jeopardy was set forth by this Court in *Diaz v. United States*, 223 U.S. 442 (1912). The New Mexico Supreme Court adopted this rule in *State v. Goodson*, 54 N.M. 184, 217 P.2d 262 (1950). The exception was also applied by the New Mexico Supreme Court to affirm Fugate's homicide conviction. Fugate argues that the *Diaz* exception was overruled by implication in *Waller v. Florida*, 397 U.S. 387 (1970). Thus, he argues, the New Mexico Supreme Court erred in affirming his vehicular

homicide conviction on the basis of this exception. However, it is not necessary to decide the validity of the "jurisdictional exception" in this case.

ARGUMENT

A. Introduction.

The decision of the New Mexico Supreme Court should be affirmed because Petitioner Fugate's convictions are not barred by the Double Jeopardy Clause. The Double Jeopardy Clause prohibits subjecting a person to jeopardy twice for the same offense. U.S. Const. Amend V. In the present case, Fugate was not placed in jeopardy twice for the same offense because the minor traffic offenses for which he was convicted in municipal court are not the same as the vehicular homicide offense for which he was convicted in the district court.¹ This is demonstrated by application of the "same offense" test approved by this Court.

Fugate contends that the New Mexico Supreme Court's decision is not supported by the "jurisdictional exception" to the prohibition against double jeopardy. However, since Fugate was not twice put in jeopardy for the same offense, it is not necessary to decide whether the jurisdictional exception is viable and applies in the present case.

¹ Respondent State of New Mexico submits the Municipal Court convictions are not lesser included offenses because they are not the same offenses as the felony of vehicular homicide. This contention was not urged by Respondent in the New Mexico courts. However, the argument is supported by the record below. *See* discussion of *State of New Mexico v. Manzanares*, 100 N.M. 621, 624 P.2d 511 (1983) *infra* at p.7. Respondent believes this argument is proper under *United States v. New York Telephone Co.*, 434 U.S. 159, 166, n.8 (1977) and *Dandridge v. Williams*, 397 U.S. 471, 475, n.6 (1970), (prevailing party may defend judgment on any ground which the law and the record permit that would not expand relief already granted.)

B. Under the Test Approved by this Court for Determining Whether Two Offenses Are the Same, the Minor Traffic Offenses Are Not the Same Offense as Vehicular Homicide.

Blockburger v. United States, 284 U.S. 299 (1932) defined the term "same offense" and the definition is still in effect:

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

284 U.S. at 304.

Under the *Blockburger* test, two offenses are not the same even though there may be a substantial overlap of proof necessary to establish both offenses. *Brown v. Ohio*, 432 U.S. 161 (1977) citing *Iannelli v. United States*, 420 U.S. 770, 785 fn.17 (1975). The facts necessary to prove each offense must be facts which are *always* necessary to prove the offense. As stated in *Illinois v. Vitale*, 447 U.S. 410, 419 (1980):

The point is that if manslaughter by automobile does not *always* entail proof of a failure to slow, then the two offenses are not the "same" under the *Blockburger* test. The mere *possibility* that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution. (Emphasis added).

Moreover, it does not matter whether facts actually used to prove the various offenses are the same, as long as the facts *necessary* to prove the offenses are different. 447 U.S. at 416.

The Court subsequently concluded that if manslaughter by automobile did not always entail proof of the failure to slow offense, the two were not the same offense. *See also Iannelli v. United States*, 420 U.S. 770 (1975); *Gore v. United States*, 357 U.S. 386 (1958); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

It is true that the *Vitale* opinion said that where the prosecution actually does use the same evidence to prove the lesser and the greater offenses, a claim of double jeopardy would be "substantial." 447 U.S. at 420 and 421. The opinion did not specify what effect would flow from such a substantial claim. *Vitale* should not be interpreted to impose an "actual evidence" test.

An "actual evidence" test would substantially change the same offense test which this Court has consistently used since *Blockburger*. The *Blockburger* same offense test is quite precise. If one offense always requires proof of another, they are considered to be the same offense. If one does not always entail proof of the other, they are not the same offense. *Illinois v. Vitale*, 447 U.S. at 419. The variety of evidentiary inferences permissible from a given course of conduct or even one act would create an imprecise, if not unworkable, framework if the "actual evidence" test were employed to resolve "same offense" questions.

The New Mexico Supreme Court also applies the same evidence test to determine whether offenses are the same. In *Fugate*, the New Mexico Supreme Court relied upon its prior decision in *State v. Manzanares*, 100 N.M. 621, 674 P.2d 511 (1983), *cert. pending*, No. 83-6361. In *Manzanares*, the court stated that the same evidence test is employed by New Mexico to decide what is the same offense. That is, would the facts offered to prove one offense also sustain conviction of another. 674 P.2d at 622. If either offense requires proof that the other does not, the offenses are not the same offense and there is no

double jeopardy. *State v. Stephens*, 93 N.M. 458, 601 P.2d 428, 433 (1979); *Owens v. Abram*, 58 N.M. 682, 274 P.2d 630, 631 (1954).

Application of the approved test to the present case demonstrates that Fugate was not subjected to double jeopardy. Vehicle homicide always requires proof of the death of a human being. The death must result from some form of unlawful operation of a motor vehicle including, but not necessarily in every case, Driving While Intoxicated (DWI) and Reckless Driving,² the minor traffic offenses Fugate was convicted of in this case. § 66-8-101, NMSA, 1984 Cum. Supp. (Pet. Brief, 2). Neither DWI nor Reckless Driving requires proof of the death of a human being. §§ 66-8-102 and 113, NMSA, 1984 Cum. Supp. (Pet. Brief, 3-4).

Nor are DWI or Reckless Driving necessarily included in the offense of vehicular homicide. For a lesser offense to be included within a greater offense, the lesser offense must necessarily, i.e., always, be included in the greater offense. For the lesser offense to be necessarily included, the greater offense cannot be committed without also committing that lesser offense. *State v. DeMary*, 99 N.M. 177, 655 P.2d 1021, 1023 (1982).

In view of the foregoing New Mexico precedent, the New Mexico Supreme Court correctly concluded its discussion of the "same offense" test in *Manzanares* by holding:

² Fugate was actually convicted of DWI and careless driving in the Carlsbad Municipal Court. The State has never argued that careless driving is not a lesser included offense of reckless driving and does not now. Careless driving is a lesser included offense of reckless driving under the the Carlsbad Municipal Ordinance. Both offenses are defined in the Municipal Code the same as the state law offenses for Reckless and Careless Driving.

Therefore, in New Mexico, a defendant may not be tried in a second trial for a greater offense which would require the presentation of all of the evidence which was used in a first trial on a *lesser included offense*. (Emphasis added.)

100 N.M. at 622, 674 P.2d at 512.

To be sure, the opinion did not specify that Homicide by Vehicle was the greater offense and that DWI or Reckless Driving were not lesser included offenses. However, that such was clear from the context of the offenses involved in *Manzanares* and here, together with established New Mexico precedent, is not open to question.

New Mexico has adhered to the view that DWI is not necessarily a lesser included offense of vehicular homicide. § 66-8-101, NMSA, 1984 Cum. Supp. (Pet. Brief, 2-4). *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975) relying on *State v. Trujillo*, 85 N.M. 208, 510 P.2d 1079 (Ct.App. 1973).

Trujillo held that under the New Mexico Homicide by Vehicle statute then applicable, the homicide offense could be committed by any one of three unlawful means of driving: DWI, driving under influence of drugs, or reckless driving. Thus, DWI ". . . may be, but is not necessarily, an element of the homicide charge." 85 N.M. at 213, 510 P.2d at 1084. A subsequent decision of the New Mexico Court of Appeals expanded upon the unlawful driving means by which vehicular homicide may also be committed. *State v. Barela*, 95 N.M. 349, 352, 622 P.2d 254, 257 (Ct. App. 1980), *cert. quashed*, 95 N.M. 426, 622 P.2d 1046 (1981). *Barela* did not involve a jeopardy issue; rather, it decided whether the accused was entitled to a reduced degree vehicular homicide instruction.

Under the foregoing analysis, no particular mode of unlawful driving is always required proof in all cases of vehicular homi-

cide. No particular mode is the "same offense" as vehicular homicide. *Illinois v. Vitale*, 447 U.S. 410 (1980); *State v. Trujillo*, 85 N.M. at 213, 510 P.2d at 1084. Any one mode of unlawful driving, standing alone, can be sufficient to sustain the operation element for vehicular homicide.

Petitioner was charged generally with violation of § 66-8-101, NMSA, 1984 Cum. Supp. (Pet. Brief, 2), i.e., the unlawful operation of a motor vehicle causing the death of another. (J.A. 5). Under New Mexico law, this general charge would permit conviction for vehicular homicide by any one of the numerous ways a vehicle may be unlawfully operated. *State v. Barela*, 95 N.M. at 352, 622 P.2d at 257.

In this case, the prosecution *did* utilize as proof of an element of vehicular homicide, the factual basis that also established the traffic offenses of DWI and reckless driving. The evidence presented in support of the vehicular homicide charge was either driving mode of DWI or reckless driving, because those were the only two modes presented to the jury. (J.A. 9-10). Therefore, on the facts of this case, proof of DWI or reckless driving conduct was necessary to prove the felony offense of vehicular homicide. These driving modes *were*, factually, essential proof for conviction of vehicular homicide but only in this case. DWI or reckless driving *are not*, statutorily, essential proof of an element of vehicular homicide in all such cases.

Under the *Vitale* analysis, none of the offenses involved in this case were the "same offense" as another. None of the involved offenses always requires proof of either of the other two. Neither DWI nor reckless driving were lesser included offenses of vehicular homicide as required statutory elements of the latter offense. Fugate has not suffered double jeopardy because he has not been twice convicted of the "same offense."

C. The Jurisdictional Exception Issue Does Not Need To Be Decided in This Case.

In 1912, this Court decided *Diaz v. United States*, 223 U.S. 442 (1912). A conviction for homicide was upheld against a claim of double jeopardy, even though Diaz was previously convicted of assault and battery in the justice of the peace court. Both offenses arose out of the same conduct which caused the death in question. The opinion created what came to be called the "jurisdictional exception." 223 U.S. at 449. Phillippine law granted jurisdiction to the justice court over the assault and battery charge but not the homicide. Jeopardy was said to only extend to those offenses within the justice's jurisdiction and not beyond it. 223 U.S. at 449.

New Mexico adopted this jeopardy exception in 1950. *State v. Goodson*, 54 N.M. 184, 217 P.2d 262, 264-65 (1950). The New Mexico Supreme Court held a plea of guilty to assault and battery in the justice of the peace court did not bar a rape prosecution arising from the same operative facts in state district court. *Goodson* cited *Diaz v. United States* as supportive of this exception. The court also relied on policy grounds to reject the jeopardy claim.

Reason and logic do not support a rule whereby one guilty of the crime of rape may escape a possible sentence of 99 years in the penitentiary by the expedient of pleading guilty to a charge of assault and battery in a justice court where the penalty may be as low as a fine of \$5.00.

54 N.M. at 188, 217 P.2d at 265.

In the present case, the New Mexico Supreme Court relied upon the jurisdictional exception announced in *Diaz v. United States* and adopted by *Goodson*. *State v. Fugate*, 101 N.M. 58, 678 P.2d 686 (1984). The analysis in this decision was based on the court's opinion several months earlier in *State v. Manzanares*, 100 N.M. 621, 674 P.2d 511 (1983), *cert. pending*.

No. 83-6361. The *Manzanares* court reaffirmed its adherence to the "jurisdictional exception" standard. The court did not find *Waller v. Florida*, 397 U.S. 387 (1970) applicable, since no claim of the jurisdictional exception was raised in *Waller*.

Fugate argues the jurisdictional exception was overruled by implication by the more recent decisions of this Court, particularly in view of the analysis employed in *Waller* to reject the "separate sovereign" theory as an anachronism. 397 U.S. at 395. (Pet. Brief, 17-20) The essential ingredient in *Waller's* rejection of the separate sovereign argument was the Florida Constitutional provision which created the two different courts that rendered the convictions in issue. 397 U.S. at 392-93. The Florida Constitutional provision noted in *Waller* is effectively identical to that in New Mexico. Compare *Waller v. Florida*, 397 U.S. at 392-93 with Article VI, § 1, New Mexico Constitution. (Pet. Brief, 2)

Waller proceeded to decision on the assumption that the separate charges filed in municipal and circuit courts were based on the same acts. Further, this Court assumed that the ordinance violations were included offenses of the felony charge. On these assumptions, *Waller* decided only the question of whether the State had the power to try defendant for the same offense in two courts. 397 U.S. at 390, fn.1. It held that Florida could not treat political subdivisions as entities separate from the state because the judicial power of both the state and its subdivisions arose from the same organic law. Thus, the "separate sovereign" theory urged by Florida was rejected. 397 U.S. at 392-95.

This Court did not prohibit *Waller's* later felony conviction under all circumstances. 397 U.S. at 395, fn.6. Further proceedings in the Florida courts concluded with *Waller's* felony conviction being affirmed. The Florida trial court held the municipal court offenses were not lesser included offenses of

felony grand larceny. The District Court of Appeals of Florida affirmed. *Waller v. State*, 270 So.2d 26 (Fla. App. 1972), cert. denied, 276 So.2d 489, cert. denied, 414 U.S. 945 (1973).

The analytical support used to reject the "separate sovereign" theory may be the same necessary to renounce the jurisdictional exception. However, the viability of the jurisdictional exception is not dispositive of this case. The case should be decided on the basis that the minor traffic offenses are not the same offense as vehicular homicide.

CONCLUSION

Fugate's conviction for vehicular homicide should be affirmed.

Respectfully submitted,

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APPENDIX

12-6-12 DRIVING REGULATIONS AND OFFENSES

12-6-12.1 OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF INTOXICATING LIQUOR.

A. It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this municipality. It is unlawful for any person who has one-tenth of one percent or more by weight of alcohol in his blood to drive any vehicle within this state. (66-8-102 NMSA 1978 as amended)

B. Any person who operates a motor vehicle within this municipality shall be deemed to have given consent, subject to the provisions of the Implied Consent Act, to a chemical test or tests of his breath or blood or for the purpose of determining the alcoholic content of his blood, if arrested for any offense arising out of the acts alleged to have been committed while the person was driving a motor vehicle while under the influence of an intoxicating liquor or any drug.

C. A test of blood or breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle within this municipality, while under the influence of intoxicating liquor. (66-8-107 NMSA 1978 as amended)

D. Any person who is dead, unconscious or otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by Section 12-6-12.1(b), and the test or tests designated by the law enforcement officer may be administered. (66-8-108 NMSA 1978)

E. Only the persons authorized by Section 66-8-1.3 NMSA 1978 shall withdraw blood from any person for the purpose of determining its alcoholic content. This limitation does not apply to the taking of samples of breath.

F. The person tested shall be given an opportunity to arrange for a physician, licensed professional or practical nurse, or laboratory technician or technologist who is employed by a hospital or physician, of his own choosing to perform a chemical test in addition to any test performed at the direction of a law enforcement officer.

G. Upon the request of the person tested, full information concerning the test or tests performed at the direction of the law enforcement officer shall be made available to him as soon as it is available from the person performing the test.

H. The law enforcement agency represented by the law enforcement officer at whose direction the chemical test is performed shall pay for the chemical test.

I. If a person exercises his right under Subsection F to have a chemical test performed upon him by a person of his own choosing, then the cost of that test shall be paid by the law enforcement agency represented by the law enforcement officer at whose direction a chemical test was administered under Subsection B. (66-8-109 NMSA 1978)

J. The results of a test performed pursuant to the Implied Consent Act may be introduced into evidence in any civil action or criminal action arising out of the acts alleged to have been committed by the person tested for driving a motor vehicle while under the influence of intoxicating liquor.

K. If the blood of the person tested contains:

(1) five one-hundredths of one percent or less by weight of alcohol, it shall be presumed that the person was not under the influence of intoxicating liquor;

(2) more than five one-hundredths of one percent but less than one-tenth of one percent by weight of alcohol, no presumption shall be made that the person either was or was not under the influence of intoxicating liquor. However, the amount of alcohol in the person's blood may be considered

with other competent evidence in determining whether or not the person was under the influence of intoxicating liquor; or

(3) one-tenth of one percent or more by weight of alcohol; the arresting officer shall charge him with a violation of this section and it shall be presumed that the person was under the influence of intoxicating liquor.

L. The percent by weight of alcohol shall be based on the grams of alcohol in one hundred cubic centimeters of blood.

M. The presumptions in Subsection K of this section do not limit the introduction of other competent evidence concerning whether or not a person was under the influence of intoxicating liquor.

N. If a person is convicted of driving a motor vehicle while under the influence of intoxicating liquor, the trial judge shall be required to inquire into the past driving record of the person before sentence is entered in the matter. (66-8-110 NMSA 1978 as amended)

O. If a person is convicted of driving a motor vehicle while under the influence of intoxicating liquor, a first offender, at the discretion of the trial court after a presentence investigation, including an inquiry to the motor vehicle division shall receive a deferred sentence on the condition that the driver attend a driver rehabilitation program, also known as the "driving-while-intoxicated school", approved by the court and the division and such other rehabilitation services as the court may determine to be necessary. Imposition of a deferred sentence shall classify the person as a first offender. The municipal court shall forward to the division the abstract of all proceedings and the report of the disposition of the case. (66-5-29 NMSA 1978 as amended)

P. When a person is charged with a violation of this section, any plea of guilty thereafter entered in satisfaction of

the charges must include at least a plea of guilty to Subsection A of this section, and no other disposition by plea of guilty to any other charge in satisfaction of such charge shall be authorized if the results of a test performed pursuant to the Implied Consent Act discloses that the blood of the person charged contains at least fifteen one-hundredths of one percent by weight of alcohol. (66-8-102 NMSA 1978 as amended)

Q. A person convicted of driving a motor vehicle while under the influence of intoxicating liquor shall be assessed, in addition to any other fee or fine, a fee of twenty-five dollars (\$25.00) to defray the costs of chemical and other tests utilized to determine the influence of liquor. The municipal court shall collect the fee and maintain the fees in a separate fund and transfer the fees along with other funds collected by the court per 35-14-7 NMSA 1978. The municipality shall maintain the fees collected pursuant to this subsection in a separate fund and transfer the fees collected pursuant to this subsection to the administrative office of the courts for credit to the crime laboratory fund. (31-12-7 through 31-12-9 NMSA 1978 as amended)

R. Nothing in this section is intended to authorize any police officer, or any judicial or probation officer, to make any arrest or to direct the performance of a blood-alcohol test, except in the performance of his official duties and as otherwise authorized by law. (66-8-104 NMSA 1978)

S. If a person under arrest for violation of an offense enumerated in the Motor Vehicle Code refuses upon request of a law enforcement officer to submit to chemical tests designated by the law enforcement agency as provided in Section 12-6-12.1B and C, none shall be administered, except when a municipal judge, magistrate or district judge issues a search warrant authorizing chemical tests as provided in Section 12-6-12.1B and C, upon his finding in a law enforcement officer's written affidavit that there is probable cause to believe

that the person has driven a motor vehicle while under the influence of alcohol or a controlled substance, thereby causing the death or likelihood of death of another person or persons, or there is probable cause to believe that the person has committed a felony while under the influence of alcohol or a controlled substance and that chemical tests as provided in Section 12-6-12.1B and C will produce material evidence in a felony prosecution. (66-8-111 NMSA 1978 as amended)

12-6-12.2 OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF DRUGS

A. It is unlawful for any person who is a habitual user of, or under the influence of, any narcotic drug, or who is under the influence of any other drug to a degree which renders him incapable of safely driving a vehicle, to drive or be in actual physical control of any vehicle within this municipality.

B. The fact that any person charged with a violation of this subsection is or has been entitled to use such drug under the laws of this state is not a defense against the charge. (66-8-102 NMSA 1978 as amended)

C. If a person is convicted of driving a motor vehicle while under the influence of any narcotic drug, a first offender, at the discretion of the trial court after a presentence investigation, including an inquiry to the motor vehicle division of the transportation department concerning the driver's driving record, shall receive a deferred sentence on the condition that the driver attend a driver rehabilitation program, also known as the "driving-while-intoxicated school", approved by the court and the division and such other rehabilitative services as the court may determine to be necessary; however, imposition of a deferred sentence shall classify the person as a first offender. The municipal court shall forward to the division the abstract of all proceedings and the report of the disposition of the case.

For the purpose of this section, marijuana, as defined in the Controlled Substance Act, shall be classified as a narcotic drug. (66-5-29 NMSA 1978 as amended)

D. A person convicted of driving a motor vehicle under the influence of any narcotic drug shall be assessed, in addition to any other fee or fine, a fee of twenty-five dollars (\$25.00) to defray the costs of chemical and other tests utilized to determine the influence of liquor. The municipal court shall collect the fee and maintain the fees in a separate fund and transfer the fees along with other funds collected by the court per 35-14-7 NMSA 1978. The municipality shall maintain the fees collected pursuant to this subsection in a separate fund and transfer the fees collected pursuant to this subsection to the administrative office of the courts for credit to the crime laboratory fund. (31-12-7 through 31-12-9 NMSA 1978 as amended)

12-6-12.3 RECKLESS DRIVING.

A. Any person who drives any vehicle carelessly and heedlessly in willful or wanton disregard of the rights or safety of others and without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger or be likely to endanger any person or property is guilty of reckless driving. (66-8-113 NMSA 1978)

B. Any person arrested under this subsection may be found guilty of the lesser included offense of careless driving.(*)

12-6-12.4 CARELESS DRIVING.

A. Any person operating a vehicle on the street shall give his full time and entire attention to the operation of the vehicle.

B. Any person who operates a vehicle in a careless, inattentive or imprudent manner, without due regard for the width, grade curves, corners, traffic, weather and road condi-

tions and all other attendant circumstances is guilty of careless driving. (66-8-114 NMSA 1978)

* * *

An asterisk (*) at the end of a paragraph indicates that there are no comparable provisions in the state code.

* * *

REPLY BRIEF

FOR ARGUMENT

No. 83-6663

(1)

Supreme Court, U.S.
FILED

FEB 4 1985

ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES FUGATE,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of New Mexico

PETITIONER'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Respondent argues that the question of "jurisdictional exception" is not dispositive of the issues raised in Petitioner Fugate's case and should not be addressed by the Court. This argument is predicated on Respondent's contention that a proper application of the rule of *Blockburger v. United States*, 284 U.S. 299 (1932) will show that Petitioner's municipal court convictions for driving while intoxicated and careless driving are not the "same offense" for double jeopardy purposes as the felony offense of vehicular homicide upon which he was subsequently charged, tried and convicted. The Respondent rests its theory on the argument that, under New Mexico law, lesser included offenses do not implicate double jeopardy protections unless they are "necessarily" included in every action brought under the statute defining the greater offense.

In reply, Fugate relies on *Brown v. Ohio*, 432 U.S. 161 (1977) and *Harris v. Oklahoma*, 443 U.S. 686 (1977), for his argument that lesser included offenses are deemed the "same offense" for double jeopardy analysis and that where the State relies on an alternative underlying theory of the prosecution upon which the accused has already been tried, the fact that other alternatives might hypothetically support a conviction on the greater offense does not defeat the double jeopardy claim. Petitioner particularly relies on *Illinois v. Vitale*, 447 U.S. 410 (1980) in support of this latter proposition.

Petitioner, further, points to apparent errors in Respondents's assessment of New Mexico law offered in support of its theory of the case. These include a misstatement of the standard applied in *Blockburger* by the New Mexico Supreme Court which may or may not still constitute that court's understanding of the *Blockburger* rule; an arguably incorrect theory of the "necessarily" included aspect of the lesser included offense rule; and a failure of Respondent to consider the elements of the greater offense applicable on the date of Fugate's trial.

Additionally, Petitioner argues that whether or not his claim of prior jeopardy might be classified as "substantial" under

Illinois v. Vitale, it should certainly be treated as "dispositive" since he has already been tried and convicted on the greater offense.

The Court should address the issue presented by Petitioner in his petition for writ of certiorari, whether the "jurisdictional exception" recognized in *Diaz v. United States*, 223 U.S. 442 (1912) remains viable in light of later decisions of this Court. Petitioner argues that this issue is truly dispositive of the issue expressly raised by the decision of the New Mexico Supreme Court in affirming his conviction. *State v. Fugate*, 101 N.M. 58, 678 P.2d 686 (1984).

ARGUMENT

Respondent has essentially advanced two lines of argument in response to the points raised by Petitioner in his brief. First, Respondent has argued that proper application of double jeopardy case law leads to the conclusion that, under New Mexico law at least, Petitioner's conviction for vehicular homicide was not the "same offense" as the municipal court offenses upon which he was earlier convicted, and thus, not barred by the Double Jeopardy Clause. Second, Respondent argued that because there was no double jeopardy violation occasioned by the subsequent felony prosecution, this Court should not address the viability of the "jurisdictional exception" which underlies the issue presented to the Court in Petitioner's application for the writ of certiorari.

Petitioner Fugate replies to the arguments advanced by the Respondent by addressing each with respect to the points initially raised in Petitioner's brief.

I. The Protections Of The Double Jeopardy Clause Are Generally Applicable To Petitioner's Claim

The thrust of Respondent's argument is that Petitioner does not demonstrate a double jeopardy claim under the facts of the case. Respondent has, however, misconstrued the requirements of *Blockburger v. United States*, 284 U.S. 299 (1932), in

arguing that Petitioner has failed to state a double jeopardy claim sufficient to invoke the protections of the Fifth Amendment. The critical language in *Blockburger* upon which Respondent and, indeed, most courts in subsequent decisions, has relied is set forth in both Petitioner's and Respondent's briefs:

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

284 U.S. at 304. Respondent incorrectly reads this language to suggest that unless all elements of the lesser offense are always included in the greater, the lesser offense is not the "same offense" for double jeopardy purposes, relying on language from *Illinois v. Vitale*, 447 U.S. 410 (1980). (Respondent's brief, at 6).

The language from *Illinois v. Vitale* relied on by Respondent does not support Respondent's position, however. The Court noted that the: "mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense" in proving its manslaughter case would not be sufficient to bar the subsequent prosecution. 447 U.S. at 419. Petitioner agrees that where the State may rely on other elements to prove a greater offense, prior conviction on lesser offenses will not bar the latter prosecution under the *Blockburger* test. See *People v. Reed*, 92 Ill.App.3d 1115, 48 Ill.Dec. 421, 416 N.E.2d 694 (1981). But once the possibility of reliance on these same "ingredients" materializes and actually forms the basis for prosecution, *Illinois v. Vitale* holds quite clearly that a "substantial" double jeopardy claim is demonstrated. 447 U.S. 420-421.

Petitioner contends that a correct analysis of *Blockburger* and *Illinois v. Vitale* can be illustrated with the following simple diagrams:

Offense	Elements
1	A, B, C
2	A, B

Assuming that offense 1 always requires proof of elements A and B, offenses 1 and 2 constitute the "same offense" under *Blockburger*, and a prior conviction on offense 2 would bar subsequent prosecution for offense 1. In *Illinois v. Vitale*, the facts suggest the following comparison of statutory provisions

Offense	Elements
1	A, B, C or D
2	C
3	D

Clearly, prior conviction for either offense 2 or 3 does not bar a subsequent prosecution unless the State must rely on the same element, C or D, that was previously used in proving the lesser offense. Respondent reads *Illinois v. Vitale* incorrectly in arguing that the quoted language limits application of Double Jeopardy Clause protections to those cases in which the lesser offense is "necessarily" included within the greater offense. (Respondent's brief, at 6). This reading of the language is wholly inconsistent with the holding of the case and the subsequent, dispositive language which noted that if Illinois did utilize the same element twice, then its prosecution for manslaughter would result in substantial double jeopardy claim.

The test argued for by Respondent would limit application of Double Jeopardy Clause protections to those cases in which the lesser included offenses are in fact, necessary to prove the greater offense in every case. Respondent states: "The Court subsequently concluded that if manslaughter by automobile did not always entail proof of the failure to slow offense, the two were not the same offense." (Respondent's brief, at 7). Respondent's conclusion is incorrect. The Court held, in contrast to Respondent's claim:

If, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the "same" under *Blockburger* and Vitale's trial on the latter charge would constitute double jeopardy under *Brown v. Ohio*. In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to

rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma*.

Respondent incorrectly implied that the Court concluded that manslaughter and failure to slow would not constitute the "same offense" unless the latter was always required as a matter of proof in prosecution for the former. Instead, the Court held that the two might be the "same offense" if proof of failure to slow is always required for proof of manslaughter and that the Double Jeopardy Clause would bar prosecution if the State had to rely on failure to slow in prosecuting the manslaughter claim in Vitale's case, even though failure to slow would not always be an included offense in a manslaughter prosecution.

The straightforward answer to Respondent's argument is found in *Harris v. Oklahoma*, 433 U.S. 682 (1977), a decision relied on by Petitioner which Respondent did not address in its brief. There, the greater offense was defined alternatively in terms of predicate elements. The Court in *Illinois v. Vitale* noted the proper mode of double jeopardy analysis employed in *Harris*:

... we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser included offense.

447 U.S. at 420. Because the State conceded that the robbery with which Harris had been charged was the underlying felony upon which his prior felony murder conviction had been obtained, the Court applied the Double Jeopardy Clause in holding that the robbery conviction was barred. The Court relied on *In re Nielsen*, 131 U.S. 176 (1889) for the proposition that conviction for an offense having several elements included in it bars subsequent prosecution for a lesser included offense consisting solely of elements already established in support of

the conviction on the greater offense. The Court concluded, significantly:

Under *Brown*, the reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense.

447 U.S. at 421.

Thus, under the holding of *Illinois v. Vitale*, Petitioner's subsequent conviction for vehicular homicide was obtained in violation of the Double Jeopardy Clause since, as Respondent admits, the State relied on the proof of the traffic offenses previously used in obtaining municipal court convictions in its prosecution for vehicular homicide. (Respondent's brief, at 10). Respondent's contention that this double usage does not invoke the protections of the Fifth Amendment because another predicate offense could have hypothetically supplied a necessary element of the felony is not supported by the decision in *Illinois v. Vitale*, as Respondent claims, and is refuted by the holding in *Harris v. Oklahoma*.

A. Respondent's Reliance On State Law With Regard To Double Jeopardy Analysis Is Incorrect.

Respondent contends that the Court should not reach the merits of Petitioner's challenge to application of the "jurisdictional exception" by the New Mexico Supreme Court in affirming his conviction because, under New Mexico law, vehicular homicide is not the "same offense" as driving while intoxicated and reckless driving and, thus, no double jeopardy claim has been demonstrated.

Initially, Petitioner Fugate notes that this claim or argument was not presented to the New Mexico appellate courts during the appeal from his felony conviction. Respondent relies on *United States v. New York Telephone Co.*, 434 U.S. 159, 166, n. 8 (1977) and *Dandridge v. Williams*, 397 U.S. 471, 475, n. 6 (1970) for the proposition that it may now assert any theory which it might have relied on in support of its judgment in the court below. While Petitioner prefers to address Respondent's

argument on the merits, he nonetheless points out that Respondent failed to litigate the lesser included offense issue now advanced in this Court in the New Mexico courts. Rather than a theory or argument supporting its position here, the opinion of the New Mexico Court of Appeals in *State v. Fugate*, 101 N.M. 82, 678 P.2d 710, 711 (Ct. App. 1983), suggests that the State waived this argument in failing to contest the court's proposed disposition of the appeal on lesser included offense analysis. Instead, as the court noted, the State merely asserted that the exceptions of *Diaz v. United States*, 223 U.S. 442 (1912) barred application of the Double Jeopardy Clause. Nor is it apparent in the opinion of the New Mexico Supreme Court that any different theory for affirmance of Petitioner's convictions was ever suggested to that court. *State v. Fugate*, 678 P.2d 686, 687 (1984). Respondent now argues this theory to this Court, basing its argument on the New Mexico Supreme Court's decision in *State v. Manzanares*, 100 N.M. 621, 674 P.2d 511 (1983), *cert. pending*, No. 83-6361.

1. Respondent Has Misstated The Test For Determining Whether Lesser Offenses Are The Same For Double Jeopardy Analysis Purposes.

In *Manzanares*, the New Mexico Supreme Court stated:

The proper definition of "same offense" is often a matter of controversy in double jeopardy cases. Generally, a conviction of a lesser offense bars a subsequent prosecution for a greater offense where the lesser offense is included in the greater offense . . . in New Mexico, a defendant may not be tried in a second trial for a greater offense which would require the presentation of all of the evidence which was used in a first trial on a lesser included offense."

674 P.2d at 512.

The *Manzanares* test appears consistent with controlling decisions of this Court. However, in arguing the application of *Manzanares* to Petitioner's case, Respondent misstates the test:

In *Manzanares*, the court stated that the same evidence test is employed by New Mexico to decide what is the same

offense. That is, would the facts offered to prove one offense also sustain conviction of another. (citation omitted). If *either* offense requires proof that the other does not, the offenses are not the same offense and there is no double jeopardy. (emphasis added).

(Respondent's brief, at 7-8). Thus, under Respondent's formulation, a double jeopardy claim could not exist with respect to lesser offenses since, by definition, a greater offense would include some element not required for proof of the lesser.

Respondent altered the language of *Blockburger* with regard to whether "each" offense requires proof of an element that the other did not to a test based on whether "either" offense requires proof of an element the other does not. Thus, under Respondent's formulation, the only case in which double jeopardy protections would be invoked would be the following:

Offense	Elements
1	A, B, C
2	A, B, C

This result is inconsistent with the opinions of the Court in *Harris v. Oklahoma* and *Brown v. Ohio*, 432 U.S. 161 (1977), as well as *Illinois v. Vitale*.

Respondent is not alone in this error, however. In *Owens v. Abram*, 58 N.M. 682, 274 P.2d 630, 631 (1954), the New Mexico Supreme Court made the same error in denying relief on a valid assertion of a double jeopardy claim. The court held:

In determining whether the offenses charged are the same, the test is whether the facts offered in support of one, would sustain a conviction of the other. *If either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing.* It is clear that the first information required proof of certain facts not required by the latter. To sustain a conviction of the former charge, an essential fact was whether the forged instrument is a document evidencing an indebtedness of a banking institution. But under the latter charge, proof of

such fact was not essential to a conviction. True, the proof offered in support of the first information would sustain a conviction of the latter charge but the converse is not true; the evidence offered in support of the latter would not sustain a conviction of the former charge. (emphasis added).

274 P.2d at 631.

The substitution of "either" for "each" in defining the parameters of the Double Jeopardy Clause is critical, as the opinion in *Owens v. Abram* discloses. There, the petitioner was deprived of relief on a claim which would have proved "substantial" under *Illinois v. Vitale*, or dispositive under *Harris v. Oklahoma* or *Brown v. Ohio*. In *State v. Stephens*, 93 N.M. 458, 601 P.2d 428 (1979), the New Mexico Supreme Court applied the same mode of analysis to a felony murder prosecution although it arguably reached a correct result. There, the court held that since felony murder required proof of an element that robbery did not, a homicide, and since robbery required proof of an actual taking of property, the two offenses were not the same for purposes of double jeopardy. Because the felony murder required proof only of an attempted robbery, the court held that the sentences for the two offenses did not merge. The court's decision departs substantively from that rendered by this Court in *Whalen v. United States*, 445 U.S. 684 (1980), although that may be explained by differences in the two statutory provisions being construed.

The *Manzanares* opinion, in contrast to the Respondent's argument, does not rely on the test advanced by the State in its brief to this Court. Instead, the *Manzanares* court limited its reliance on *Owens v. Abram* to the expression that the "same evidence" test employed in New Mexico is "whether the facts offered in support of one [offense], would sustain a conviction of the other." 674 P.2d at 512.

Assuming that the New Mexico Supreme Court has departed from its earlier holding, Respondent has misinterpreted the standard for review of double jeopardy claims in attempting to explain its alternative ground for relief to this

Court. If, in fact, Respondent has correctly stated the position of New Mexico courts in relying on *Owens v. Abram*, then it is clear that New Mexico has failed to properly incorporate the decisions of this Court in its approach to double jeopardy matters.

2. Respondent's Argument That A Lesser Included Offense Is Not The "Same" For Double Jeopardy Purposes Unless It Is Necessarily Included Is Incorrect.

In addition to its argument that double jeopardy protections are invoked only when the two offenses scrutinized are mutual in their elements, Respondent also argues that the New Mexico approach to double jeopardy recognizes a bar when the lesser included offense is "necessarily" included within the greater offense. (Respondent's brief, at 8). This assertion is inconsistent with the interpretation argued in Respondent's brief that no bar would exist where "either" of the offenses requires proof that the other does not since, by definition, a lesser included offense does not require proof of all elements required for conviction on the greater offense. Nevertheless, Petitioner addresses this argument on the merits.

Respondent argues that since proof of vehicular homicide can be established without reliance on either DWI or reckless driving, these offenses are not "necessarily included" in the felony. Certainly, there are a number of cases in which lesser included offenses are also necessarily included, as Justice Rehnquist pointed out in his dissent in *Whalen v. United States*, noting that proof of assault with a deadly weapon will always entail proof of the lesser offense of assault and observing that "this relationship holds true regardless whether one examines the offenses in the abstract or in the context of a particular criminal transaction." 445 U.S. at 709.

Respondent contends that double jeopardy protections are available only if the lesser included offenses upon which the accused has initially been convicted are necessarily included in the greater offense subsequently charged. Thus, *Fugate*

would not have substantial or dispositive double jeopardy claim unless vehicular homicide always requires proof of DWI or reckless driving. Respondent relied on *State v. DeMary*, 99 N.M. 177, 655 P.2d 1021 (1982) for support for its argument that a lesser offense is only an included offense if "the greater offense cannot be committed without also committing [the] lesser offense." (Respondent's brief, at 8). *DeMary*, however, did not deal with double jeopardy analysis even though the decision purports to explain lesser included offense law in New Mexico. In contrast to Respondent's argument here that review of evidence should be excluded from double jeopardy analysis (Respondent's brief, at 7), the *DeMary* court expressly held that the elements of the greater and lesser offenses "must initially be construed in light of the evidence. The particular facts of each case must then be reviewed in light of the specific elements of each crime." 655 P.2d at 1023.

Far from supporting Respondent's position with respect to reviewing the evidence offered in support of conviction, *DeMary* suggests that proper lesser included offense analysis requires consideration of the evidence and theory of the case advanced by the State at trial.

Moreover, the *Manzanares* court never spoke of "necessarily" included offenses in the language cited by Respondent, nor did it refer to its opinion of one year earlier in *DeMary* at any point in its explanation of how New Mexico conducts lesser included offense analysis for double jeopardy purposes. (Respondent's brief, at 9). Instead, the court simply held:

Therefore, in New Mexico, a defendant may not be tried in a second trial for a greater offense which would require the presentation of all of the evidence which was used in a first trial on a lesser included offense.

674 P.2d at 512. Assuming, however, that Respondent is correct and that *Manzanares* really refers to necessarily included offenses by implication, this approach conflicts with decisions of this Court which have examined the type of fact pattern presented by *Fugate*. *Harris v. Oklahoma*; *Brown v. Ohio*; *Illinois v. Vitale*.

Respondent's contention that a lesser offense must necessarily be included within the greater in order to support a claim based on prior jeopardy is neither supported by New Mexico case law nor the prior decisions of this Court.

3. Respondent's Reliance On *State v. Barela* Is Misplaced.

Respondent relies on *State v. Barela*, 95 N.M. 349, 622 P.2d 254 (Ct. App. 1980), *cert. quashed*, 95 N.M. 426, 622 P.2d 1046 (1981), in support of its argument that the offense of vehicular homicide could be prosecuted on numerous theories apart from driving while intoxicated and reckless driving. The *Barela* decision itself discloses that vehicular homicide may be predicated upon any charge of unlawful driving or operation of a motor vehicle, yet the offense is only a felony and, thus, a greater offense, if committed while operating a vehicle while intoxicated by liquor, while under the influence of drugs or recklessly. All other theories underlying vehicular homicide result in misdemeanor punishment only, as Judge Wood's dissenting opinion in *Barela* notes. 622 P.2d at 259-260.

Petitioner Fugate does agree that the offense of vehicular homicide may generally be predicated on any of three underlying offenses, as noted in the preceding paragraph, but the record in his cases discloses that the only two bases for prosecution available to the State were driving while intoxicated by liquor and reckless driving. (See Criminal Complaint, J.A. 3-4, no allegation of driving while under the influence of drugs). None of the other theories of unlawful operation suggested by the *Barela* would have subjected him to felony punishment under Section 66-8-101C. Any other theory of the offense would have exposed Petitioner to additional punishment for a misdemeanor only, arguably raising a different double jeopardy claim based on successive prosecutions to that presented here.

Further, even if Fugate could have theoretically been prosecuted on other theories underlying a charge of vehicular homicide, this argument would only have relevance if he were now

attempting to avoid a second trial, as Vitale did. Here, the issue is before the Court after conviction on the second trial, his plea of former jeopardy having been denied by the trial court. The Court need not consider alternative theories at this point; as Respondent admits, the State did rely on the driving while intoxicated and reckless driving charges in proving its vehicular homicide case. (Respondent's brief, at 10).

Respondent's reliance on *Barela* lends no additional weight to its argument. The decision to prosecute some vehicular homicides as felonies and some as misdemeanors is a legislative one on which New Mexico has spoken. 622 P.2d 256-257. The only issue suggested by *Barela* that has relevance to this case is whether the alternative theory of prosecution—vehicular homicide committed while driving under the influence of drugs—supports Respondent's argument that necessarily included lesser offenses are the only ones which trigger the double jeopardy protections of the Fifth Amendment. Petitioner believes that the decisions cited in support of his argument reject that position taken by Respondent here. See *Brown v. Ohio*, 432 U.S. at 166, n.6 (lesser included and greater offenses are the "same" under *Blockburger*).

4. Respondent's Argument Fails To Consider The Statutory Language Governing Petitioner's Conviction And Its Subsequent Amendment With Respect To Double Jeopardy Analysis.

Respondent also observes that in *State v. Trujillo*, 85 N.M. 208, 510 P.2d 1079 (Ct. App. 1973), the New Mexico Court of Appeals noted that vehicular homicide could be prosecuted on any one of three predicate theories of unlawful driving: driving while intoxicated; driving while under the influence of drugs; or reckless driving. The current statute provides specifically that the felony grade offense of vehicular homicide may be established by proof that the accused committed homicide by vehicle or great bodily injury by vehicle "while under the influence of intoxicating liquor or while under the influence of any drug or while violating Section 66-8-113 NMSA 1978." N.M. Stat. Ann. § 66-8-101C (1984 Cum. Supp.).

Thus, under the current statute, the elements of the greater and lesser offenses could be compared:

Offense	Elements
1	A, B, C or D
2	B
3	C
4	D

where 2 represents driving while intoxicated, 3 represents driving while under the influence of drugs and 4 represents a violation of N.M. Stat. Ann. § 66-8-113 (1978). Fugate was first convicted of two of the three predicate underlying offenses which may establish the element necessary for felony prosecution for vehicular homicide. Respondent's argument that his prior convictions were not *necessarily* included in the vehicular homicide charge in terms of statutory comparison is correct, since he was not convicted of the other predicate offense which might form the basis for felony prosecution—driving while under the influence of drugs. Respondent concedes, of course, that in his trial on the greater charge the State did rely on the same two underlying offenses for which he had previously been convicted.

The problem in Respondent's argument arises when the language of the statute under which Petitioner was actually tried is examined. The history of Section 66-8-101 provided by the commentary to the statute appearing in the 1984 Cumulative Supplement demonstrates that the language argued by the Respondent in support of its *Blockburger* analysis was added by a 1983 amendment, well after the date of the offense, trial and conviction. The commentary notes:

The 1983 amendment substituted "vehicle" for "vehicles" in two places in the catchline and, in Subsection C, added "while under the influence of intoxicating liquor or while under the influence of any intoxicated drug or," deleted "66-8-102 or" after "while violating Section," substituted "third" for "fourth" near the middle of the subsec-

tion and added "and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978."

N.M. Stat. Ann. § 66-8-101 (1984 Cum. Supp.).

The statutory provision under which Petitioner Fugate was tried was not couched in the alternative language of the current provision recognizing three underlying offenses which can support a felony vehicular homicide prosecution. Instead, these underlying elements were phrased merely as violations of two other statutory provisions, Sections 66-8-102 and 66-8-113. The elements of the respective offenses are, therefore:

Offense	Elements
1	A, B, C
2	B
3	C

Applying *Blockburger* to the version of Section 66-8-101C in effect at the time of Petitioner's offense, trial and conviction, all necessary elements of the greater offense are encompassed in the proof required for conviction on the lesser included offenses because the elements are referred to as violations of separate statutory offenses. Thus, proof that Petitioner had violated either Section 66-8-102, which governed both driving while intoxicated with liquor and driving while under the influence of drugs, would have been sufficient to establish the underlying offense element of felony vehicular homicide. Similarly, proof of a violation of Section 66-8-113 would have satisfied the alternative theory for felony vehicular homicide prosecution. Since the evidence demonstrated that Petitioner was previously convicted under both statutes, there was no alternative theory available to the State for its felony prosecution.

Consequently, Respondent's argument that the *Blockburger* test can only be satisfied by reliance on *necessarily* included offenses still fails. Under the statute governing the Petitioner's prosecution and conviction, the prior convictions for underlying offenses satisfied both of the alternative theories under which the State could have conceivably prose-

cuted Petitioner for felony vehicular homicide. The *Blockburger* test, even in the restricted form argued for by Respondent, was met in Petitioner's case and his claim of prior jeopardy should have been sustained.

B. Petitioner's Claim For Relief Should Be Deemed "Dispositive" In This Case.

Respondent notes the language of *Illinois v. Vitale* in which the majority referred to the double jeopardy claim advanced by the petitioner there as "substantial," assuming that Illinois were to rely on proof already used to establish the lesser offense in its prosecution of Vitale for manslaughter. This reference to "substantial" in terms of assessing a double jeopardy claim also concerned the dissenters in *Vitale*. 447 U.S. at 426 (Stevens, J., dissenting, joined by Brennan, Steward and Marshall, JJ).

The procedural posture of Petitioner Fugate's case is readily distinguishable from that of the petitioner in *Illinois v. Vitale*. There, the petitioner sought to bar a second trial based on his claim of prior jeopardy. Fugate has already been tried, convicted, sentenced and imprisoned following denial of his motion to dismiss on double jeopardy grounds. While the Court might distinguish "substantial" from "dispositive" claims of double jeopardy by assigning the former to a claim stated prior to the second trial, in this case the violation should be deemed "dispositive" since the record of Fugate's trial, as conceded by Respondent, would show that the State did rely on evidence used to convict him of the municipal court offenses in its proof of the felony vehicular homicide charge. There is nothing left to speculation concerning the State's theory or evidence in the case. In contrast, the majority in *Illinois v. Vitale*, perhaps overly cautious as the dissenters suggested, faced a claim brought to bar a second trial.

Certainly, this is the type of claim which would fall within the general principle of finality suggested by *Abney v. United States*, 431 U.S. 651, 661 (1977), since Petitioner might have

avoided an unnecessary second trial had trial counsel sought an interlocutory appeal or writ of prohibition following denial of her motion to dismiss. New Mexico case law on this point is apparently unsettled, however, as to whether Petitioner would have had a right to appeal from the denial of the motion to dismiss on double jeopardy grounds. *See State v. Mestas*, 93 N.M.765, 605 P.2d 1164 (Ct. App. 1980)(declining to rule on issue of whether order denying motion to dismiss on double jeopardy grounds is "final," for purposes of right of appeal following *Abney*, the court treating the appeal as an interlocutory appeal); *State v. DeBaca*, 88 N.M. 454, 541 P.2d 634 (Ct. App. 1975)(reviewing prior jeopardy claim on interlocutory appeal); *State v. Sedillo*, 88 N.M. 240, 539 P.2d 630 (Ct. App. 1975)(reviewing defendant's prior jeopardy claim after subsequent trial and conviction).

Once a second trial and conviction have been obtained, a review of the charges and evidence offered in support of them should always conclude in resolution of double jeopardy claims "dispositively." Similarly, where the comparison of elements of two statutes demonstrates that a second prosecution must be barred under *Blockburger*, the double jeopardy claim should be deemed "dispositive" and result in a bar being imposed to further prosecution. However, Petitioner recognizes that many claims require reference to the facts or evidence adduced in a particular case, such as those which are based on claims of misconduct provoking or other impropriety in the grant of mistrial. The claim raised in *Illinois v. Vitale* also required some consideration of the alternative theories of prosecution which might be relied upon by the state in its manslaughter case, as the majority there noted. In these cases, the claim of prior jeopardy might properly be deemed "substantial" if the allegations made by the accused would require imposition of the double jeopardy bar unless refuted by the prosecution. Thus, a "substantial" claim would prove "dispositive" once conceded by the state or demonstrated by the record of the prior proceeding.

Justice Stevens, in dissenting in *Illinois v. Vitale*, correctly pointed to the generality of pleading as a principal problem in

ascertaining the prosecution's theory of its case. This same pleading generality is evidenced by the pleadings in Fugate's vehicular homicide prosecution. (J.A. 5-6, criminal information). The State never gave notice in the charging instrument of the theory of underlying offenses it would use in Petitioner's trial; instead, the theory is set forth in the jury instructions (J.A. 9-10) which, under New Mexico law, constitute the legal theory of the case. *State v. Stettheimer*, 94 N.M. 149, 607 P.2d 1167 (Ct. App. 1980).

One potential solution to resolution of double jeopardy issues based on lesser included offenses would simply be to require the state to plead its theory of the offense specifically once the second prosecution is challenged by the accused. A second approach, advocated by Justice Brennan in his concurring opinion in *Ashe v. Swenson*, 397 U.S. 436, 448 (1970), would be to simplify all multiple prosecution law by requiring that the prosecution bring all charges arising from the same criminal act, transaction or episode in a single trial. As the *Manzanares* court pointed out, this approach was specifically rejected in New Mexico by the court in *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975). Nevertheless, this approach represents the best solution to litigating claims of double jeopardy based on multiple prosecutions available.

Regardless of whether the Court gives further definition to the term "substantial" in reviewing claims of prior jeopardy or whether the Court adopts any posture to deal prospectively with claims of prior jeopardy, Petitioner is entitled to relief in this cause because his claim unquestionably invokes the principle of justice embodied by the Double Jeopardy Clause.

II. The Court Should Address The Issue Of The "Jurisdictional Exception" In Disposing Of Petitioner's Claim On The Merits

Respondent argues that the Court should not address the issue of the "jurisdictional exception" recognized in *Diaz v. United States*, 223 U.S. 442 (1912) because that issue is not dispositive of Petitioner's claims. (Respondent's brief, at 13). In so doing, Respondent virtually concedes that the Court

should apply *Waller v. Florida*, 397 U.S. 387 (1970) to hold that a jurisdictional exception based on the concept of "dual sovereignty" is no longer viable. (Respondent's brief, at 12-13).

The Court should address the continuing viability of the "jurisdictional exception," however, because this issue is at the heart of the New Mexico Supreme Court's opinion affirming Petitioner Fugate's felony conviction. 678 P.2d at 687. While Respondent now argues in this Court that its lesser included offense argument would have been viable as an alternative theory of relief (Respondent's brief, at 5, *see especially* n.1), Petitioner contends that this issue was effectively waived after the State failed to litigate this issue in the New Mexico Court of Appeals. In fact, the State effectively conceded that Petitioner's conviction for careless driving in the municipal court amounted to the "same offense" as reckless driving for purposes of double jeopardy analysis, as the opinion notes. *State v. Fugate*, 678 P.2d 710, 711 (Ct. App. 1983). Similarly, in its companion case, *State v. Padilla*, 101 N.M. 78, 678 P.2d 706, 707-708 (Ct. App. 1983), the State lost on the lesser included offense issue it argued to the New Mexico Court of Appeals. The opinion in *Manzanares*, while recognizing that an accused may not be tried on a greater offense "which would require the presentation of all of the evidence which was used in a first trial on a lesser included offense," 674 P.2d at 512, never restricted its application of the double jeopardy bar to "necessarily" included offenses in terms of statutory elements, as Respondent now argues in this Court.

The *Manzanares* court predicated its holding on application of the "jurisdictional exception," as the opinion clearly shows. *Id.* at 513. In fact, the court expressly rejected the argument that reliance on the jurisdictional exception in the prior opinion in *State v. James*, 93 N.M. 605, 603 P.2d 715 (1979) was dicta. The thrust of the *Manzanares* opinion is that the jurisdictional exception is precisely that—an exception to the application of the Double Jeopardy Clause in circumstances which would otherwise require that a subsequent prosecution be barred. Respondent's argument that an alternative theory of the case

should now be reviewed is not supported by either New Mexico case law or its own litigation strategy in the New Mexico courts. If Respondent's view of *Blockburger* and its application under New Mexico case law were correct, the New Mexico courts would have had no reason to rely on the jurisdictional exception as a basis for denying Petitioner's claim, as well as the claims of other litigants in the New Mexico cases dealing with this point.

The history of double jeopardy litigation in this Court demonstrates the need to reverse the New Mexico Supreme Court's decision relying on the "jurisdictional exception" of *Diaz v. United States* to affirm Petitioner Fugate's conviction. Respondent's argument concerning the proper application of double jeopardy protections would have been far better preserved for argument in this Court had it been urged and addressed by the New Mexico Supreme Court in its opinion. Instead, the opinion unequivocally rests on its application of the *Diaz* exception, raising the precise issue upon which Petitioner applied and this Court granted the writ of certiorari. At this point in the litigation Petitioner believes that the Court should decide whether New Mexico is correctly applying the Fifth Amendment's double jeopardy protections in state prosecutions.

CONCLUSION

Petitioner Charles Fugate respectfully moves the Court reverse the judgment of the New Mexico Supreme Court and issue an appropriate order for the granting of relief consistent with the Court's opinion.

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SUPPLEMENTAL BRIEF

(4)
No. 83-6663

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ALEXANDER L. STEVAS.

CLERK

IN THE
Supreme Court of the United States

October Term, 1984

CHARLES FUGATE,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW MEXICO

SUPPLEMENTAL BRIEF
FOR THE RESPONDENT

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INTRODUCTION

Respondent State of New Mexico files this Supplemental Brief to provide the Court with copies of the applicable state statutes as they existed in 1981 when Petitioner was charged with the offenses at issue in this case. *Homicide by Vehicles; Great Bodily Injury by Vehicles*, Section 66-8-101, and *Persons Under Influence of Intoxicating Liquor [or Drugs]*, Section 66-8-102, NMSA, 1981 Cumulative Supplement were slightly different in 1981 than the 1984 versions of those offenses. Petitioner's Brief, pp. 2-3, contains only the 1984 versions of those state statutes.

Reckless Driving, Section 66-8-113 and *Careless Driving*, Section 66-8-114, NMSA, have remained the same during the applicable time frames of this case.

66-8-101. Homicide by vehicles; great bodily injury by vehicles.

A. Homicide by vehicle is the killing of a human being in the unlawful operation of a motor vehicle.

B. Great bodily injury by vehicle is the injuring of a human being, to the extent defined in Section 30-1-12 NMSA 1978, in the unlawful operation of a motor vehicle.

C. Any person who commits homicide by vehicle or great bodily injury by vehicle while violating Section 66-8-102 or 66-8-113 NMSA 1978 is guilty of a fourth degree felony. Provided that violation of speeding laws as set forth in the Motor Vehicle Code shall not per se be a basis for violation of Section 66-8-113 NMSA 1978.

* * * * *

30-1-12. Definitions.

As used in the Criminal Code:

A. "great bodily harm" means an injury to the person which creates a high probability of death; or which causes serious disfigurement; or which results in permanent or protracted loss or impairment of the function of any member or organ of the body;

* * * * *

66-8-102. Persons under influence of intoxicating liquor [or drugs] ; penalty.

A. It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this state.

B. It is unlawful for any person who is an habitual user of, or under the influence of, any narcotic drug, or who is under the influence of any other drug to a degree which renders him incapable of safely driving a vehicle, to drive any vehicle within this state. The fact that any person charged with a violation of this subsection is or has been entitled to use such drug under the laws of this state is not a defense against the charge.

C. Every person under first conviction under this section shall be punished by imprisonment for not less than thirty days nor more than ninety days or by a fine of not less than three hundred dollars (\$300) nor more than five hundred dollars (\$500), or both. On a first conviction under this section, any time spent in jail for the offense prior to the conviction for that offense shall be credited to any term of imprisonment fixed by the court. A second or subsequent conviction shall be punished by imprisonment for not less than ninety days nor more than one year or by a fine of not more than one thousand dollars (\$1,000) or both. Notwithstanding any provision to the contrary for suspension or deferment of execution of a sentence imposed under this subsection, the imposition or execution of the first two days of the jail sentence imposed for a second or subsequent offense that occurred within five years of a prior offense may not be deferred or suspended. In the case of a

first offense under this section, the magistrate court has concurrent jurisdiction with district courts to try the offender. This section does not affect the authority of a municipality under a proper ordinance to prescribe penalties for driving while under the influence of intoxicating liquor or drugs. A conviction under a municipal ordinance prescribing penalties for driving while under the influence of intoxicating liquor or drugs shall be deemed to be a conviction under this section for purposes of determining whether a conviction in magistrate court is a second conviction.

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66-8-113. Reckless driving.

A. Any person who drives any vehicle carelessly and heedlessly in willful or wanton disregard of the rights or safety of others and without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property is guilty of reckless driving.

B. Every person convicted of reckless driving shall be punished upon a first conviction by imprisonment for not less than five days nor more than ninety days or by a fine of not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100), or both, and on a second or subsequent conviction, by imprisonment for not less than ten days nor more than six months, or by a fine of not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000), or both.

C. Upon conviction of violation of this section, the director may suspend the license or permit to drive and any nonresident operating privilege for not to exceed ninety days.

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66-8-114. Careless driving.

A. Any person operating a vehicle on the highway shall give his full time and entire attention to the operation of the vehicle.

B. Any person who operates a vehicle in a careless, inattentive or imprudent manner, without due regard for the width, grade, curves, corners, traffic, weather and road conditions and all other attendant circumstances is guilty of a misdemeanor.

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31-18-15. Sentencing authority; noncapital felonies; basic sentences and fines; parole authority.

A. If a person is convicted of a noncapital felony, the basic sentence of imprisonment is as follows:

- (1) for a first degree felony, eighteen years imprisonment;
- (2) for a second degree felony, nine years imprisonment;
- (3) for a third degree felony, three years imprisonment;
- or
- (4) for a fourth degree felony, eighteen months imprisonment.

B. The appropriate basic sentence of imprisonment shall be imposed upon a person convicted of a first, second, third or fourth degree felony unless the court alters such sentence pursuant to the provisions of Section 31-18-15.1, 31-18-16 or 31-18-17 NMSA 1978.

C. The court shall include in the judgment and sentence of each person convicted of a first, second, third or fourth degree felony and sentenced to imprisonment in a corrections facility designated by the corrections and criminal rehabilitation department, authority for a period of parole to be served in accordance with the provisions of Section 31-21-10 NMSA 1978 after the completion of any actual time of imprisonment and authority to require, as a condition of parole, the payment of the costs of parole services in accordance with the provisions of that section. The period of parole shall be deemed to be part of the sentence of the convicted person in addition to the basic

sentence imposed pursuant to Subsection A of this section together with alterations, if any, pursuant to the provisions of Section 31-18-15.1, 31-18-16 or 31-18-17 NMSA 1978.

D. The court may, in addition to the imposition of a basic sentence of imprisonment, impose a fine not to exceed:

- (1) for a first degree felony, fifteen thousand dollars (\$15,000);
- (2) for a second degree felony, ten thousand dollars (\$10,000); or
- (3) for a third or fourth degree felony, five thousand dollars (\$5,000).

Respectfully submitted,

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